

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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	:
In re	:
	:
LEHMAN BROTHERS HOLDINGS INC., et al.,	:
	:
Debtors.	:
	:
-----x	

Chapter 11
Case No. 08-13555 (JMP)
(Jointly Administered)
Ref. Docket No. 40246

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CAROL ZHANG, being duly sworn, deposes and says:

1. I am employed as a Noticing Coordinator by Epiq Bankruptcy Solutions, LLC, located at 757 Third Avenue, New York, New York 10017. I am over the age of eighteen years and am not a party to the above-captioned action.
2. I caused to be served the:
 - a) “Order Establishing Hearing on Plan Administrator’s Omnibus Objection to Claims Filed by Deborah E. Focht,” dated September 30, 2013 [Docket No. 40246], (“Order”), and
 - b) *Transcript from September 26, 2013 Hearing*, a sample of which is annexed here to as Exhibit A, (the “Transcript”),

by causing true and correct of the:

- i. Order, to be delivered via electronic mail to the following party:
americanreply@gmail.com, on September 30, 2013,
- ii. Order, to be enclosed securely in separate postage pre-paid envelopes and delivered via overnight mail to those parties listed on the annexed Exhibit B, on September 30, 2013,
- iii. Transcript, to be delivered via electronic mail to the following party:
americanreply@gmail.com, on October 1, 2013, and

- iv. Transcript, to be enclosed securely in separate postage pre-paid envelopes and delivered via overnight mail to those parties listed on the annexed Exhibit C, on October 1, 2013.
3. All envelopes utilized in the service of the foregoing contained the following legend:
“LEGAL DOCUMENTS ENCLOSED. PLEASE DIRECT TO THE ATTENTION OF ADDRESSEE, PRESIDENT OR LEGAL DEPARTMENT.”

Sworn to before me this
1st day of October, 2013
/s/ Elli Krempa
Notary Public, State of New York
No. 01KR6175879
Qualified in Suffolk County
Commission Expires October 22, 2015

/s/ Carol Zhang

Carol Zhang

EXHIBIT A

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 - - - - - x

4 In re:

5 08-13555 (JMP)

6 LEHMAN BROTHERS HOLDINGS INC., (Jointly Administered)

7 ET AL.,

8 Debtors.

9 - - - - - x

10 In re:

11 08-01420 (JMP) (SIPA)

12 LEHMAN BROTHERS INC.,

13 Debtor.

14 - - - - - x

15

16 U.S. Bankruptcy Court

17 One Bowling Green

18 New York, New York

19

20 September 26, 2013

21 10:04 AM

22

23 B E F O R E :

24 HON JAMES M. PECK

25 U.S. BANKRUPTCY JUDGE

1 Hearing re: Plan Administrator's Omnibus Objection to
2 Claims Filed by Deborah E. Focht [ECF No. 34303]

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4 Hearing re: Trustee's Twenty-Eighth Omnibus Objection to
5 General Creditor Claims (Late-filed Claims) [LBI ECF No.
6 5775]

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25 Transcribed by: Dawn South

1 A P P E A R A N C E S :

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6

7 BY: ZAW WIN, ESQ.

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14 BY: MEAGHAN C. GRAGG, ESQ.

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22 BY: JEFFREY A. COOPER, ESQ.

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25

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20 BY: TAL M. UNRAD, ESQ. (TELEPHONIC)

21

22 ALSO PRESENT:

23 ADAM EPSTEIN

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P R O C E E D I N G S

THE COURT: Be seated, please. Good morning.

Good morning.

MR. WIN: Good morning, Your Honor. Zaw Win,
Weil, Gotshal & Manges for Lehman Brothers Holdings Inc.

The first matter on today's agenda is the plan
administrator's omnibus objection to claims filed by Deborah
Focht.

I understand that the purpose of the hearing today
is to come up with a plan to resolve this objection, which
has been pending since last January, and as such I think it
would be helpful to briefly review the procedural history of
this objection.

THE COURT: I would appreciate that.

MR. WIN: The plan administrator first filed its
objection to Ms. Focht claim on January 29th, 2013, it's
listed at ECF number 34303. The hearing on that omnibus
objection was originally scheduled for February 28th, 2013.

On February 21st, Ms. Focht filed a response to
the plan administrator's objection, which is listed at ECF
number 35026, in which he requested additional time to
respond.

Accordingly, the plan administrator consented to
this first adjournment and the hearing was adjourned until
March 28th, 2013.

1 On March 22nd the plan administrator further
2 adjourned that -- the hearing on its objection to
3 April 25th.

4 And on March 25th, Ms. Focht filed an amended
5 response to the plan administrator's omnibus objection.

6 And shortly after on April 22nd the plan
7 administrator filed its reply to Ms. Focht's two responses.
8 That reply is listed at ECF number 36737.

9 This Court first held a hearing on the plan
10 administrator's omnibus objection on April 25th, and
11 following the hearing the Court entered an order disallowing
12 three out of Ms. Focht's five claims. The three disallowed
13 claims were claim numbers 42914, 42915, and 42916. This
14 order was listed as ECF number 36993.

15 The order also adjourned the hearing on the
16 omnibus objection as it related to the two remaining claims,
17 which are claim numbers 34380 and 34381, until June 13th,
18 2013.

19 In response to a further request from Ms. Focht
20 the plan administrator agreed to another adjournment, this
21 time pushing the hearing from June 6th to June 27th, again,
22 2013.

23 On June 20th Ms. Focht filed a second amended
24 response to the plan administrator's omnibus objection,
25 which is listed at ECF number 38147.

1 And on June 24th the plan administrator filed its
2 reply to Ms. Focht's second amended response, which is
3 listed at ECF number 38138.

4 On June 25th the hearing was further adjourned
5 until July 17th.

6 On July 16th Ms. Focht filed a motion to strike
7 the plan administrator's reply, which is listed at ECF
8 number 38796, and at a hearing on July 17th the Court gave
9 Ms. Focht what the plan administrator understood to be a
10 final chance to provide a plausible argument as to why the
11 two remaining claims should not be disallowed. The Court
12 also adjourned the hearing on the plan administrator's
13 objection to August 29th, 2013.

14 At Ms. Focht's request on August 26th the hearing
15 on the plan administrator's omnibus objection was further
16 adjourned until today.

17 On September 25th, which is yesterday, Ms. Focht
18 contacted plan administrator's counsel to request a further
19 adjournment.

20 So to date Ms. Focht -- this matter has been
21 adjourned five times, Ms. Focht has had three hearings on
22 her response to the plan administrator's objection, and
23 she's had an opportunity to file four separate responses,
24 each one of which has been fairly voluminous.

25 The plan administrator has reviewed all the

1 documents that Ms. Focht submitted and continues to be of
2 the view that there's no merit to the two remaining claims.

3 As such the plan administrator would like to come
4 up with some kind of a schedule which in relatively short
5 period of time would allow this matter to be resolved.

6 THE COURT: I totally agree, and I recall the
7 hearing that took place this summer when I gave Ms. Focht a
8 last and final opportunity to appear and to explain her
9 position, and since then there have been two additional
10 requests for continuance for adjournment. The most recent
11 being yesterday.

12 My courtroom deputy received word of this and
13 discussed it with me in chambers yesterday afternoon, and I
14 concluded that given the fact that Ms. Focht lives in
15 Florida, is acting on her own behalf, has been advised
16 repeatedly that time is running out and that she needs to
17 either appear personally or appear through counsel to
18 explain her position, because the Court does not find her
19 documentation and her written submissions to be self-
20 sustaining.

21 I believe it is necessary now for there to be what
22 amounts to a last and final opportunity, what is really
23 another last and final opportunity, for her to deal with
24 this matter.

25 Recognizing the enormity of Lehman case, which has

1 been pending now for more than five years, this single claim
2 objection has already consumed more judicial time than any
3 other claim objection that this Court has considered. That
4 statement is really quite extraordinary, but true.

5 And so what I suggest is that an order be prepared
6 that sets forth a final hearing date, that that order
7 provide for a hearing on October 24, which I believe is the
8 next omnibus hearing date for claims, that it recite the
9 very same history of adjournments that have occurred as you
10 have indicated on the record, and that it provide that there
11 will be no further adjournments, and that if Ms. Focht fails
12 to appear, either in person to act on her own behalf or
13 through counsel, that I will proceed in her absence on that
14 date to hear your final arguments as to why the remaining
15 claims should not be disallowed.

16 She should be given actual notice of this order
17 and perhaps by separate mailing or email a copy of the
18 transcript of today's hearing as it relates to her claim.

19 MR. WIN: Thank you, Your Honor.

20 That concludes the Chapter 11 portion of today's
21 agenda, so I'll turn the podium over to Hughes Hubbard for
22 the LBI portion.

23 May I be excused?

24 THE COURT: You may be excused. Thank you very
25 much.

1 MR. WIN: Thank you.

2 (Pause)

3 THE COURT: Please proceed.

4 MS. GRAGG: Good morning, Your Honor, Meaghan
5 Gragg with Hughes Hubbard & Reed for the SIPA trustee.

6 On the calendar today is the trustee's 28th
7 omnibus objection to late filed claims. We're here today on
8 four claims that were adjourned from the hearing that was
9 held on June 19th.

10 Since that hearing Your Honor issued a memorandum
11 decision upholding the trustee's determination and
12 disallowing and expunging the claims heard at the June
13 hearing. The Court's order has become final and non-
14 appealable as to those claims.

15 We have apprised all of the claimants presently
16 before the Court today of the Court's decision but they
17 continue to prosecute their claims.

18 Apart from Your Honor's issuance of the decision
19 on the late filed claims before the Court in June
20 Mr. Thomas' counsel filed a letter with the Court Monday
21 evening seeking a factual hearing on the circumstances
22 surrounding his filing of his claim after the mandatory six-
23 month bar date.

24 Our papers lay out the trustee's position as to
25 the claims before the Court today and we believe that this

1 Court's decision should be applied with respect to those
2 claims.

3 For the reasons set forth in the trustee's reply
4 brief and in the Court's opinion we believe that a factual
5 hearing regarding Mr. Thomas' claims is unwarranted and that
6 the claims before the Court today should be disallowed and
7 expunged because they were untimely.

8 Mr. Caputo of SIPC is present in court today and
9 the trustee and SIPC will respond to any arguments made by
10 the claimants today or any questions that Your Honor may
11 have.

12 THE COURT: Okay. I think it would be useful to
13 allow each of the affected claimants to comment about their
14 particular situation and what it is about their situation
15 that distinguishes their treatment from the treatment
16 discussed in the Court's July 11 opinion with regard to
17 other similarly situated claimants. And that may be a
18 decent way for us to proceed, in effect looking for
19 distinguishing characteristics, if there are any.

20 MS. GRAGG: Okay. Thank you.

21 MR. COOPER: Good morning, Judge, Jeffrey Cooper,
22 Rabinowitz, Lubetkin & Tully for claimant Stephen Thomas.
23 Good morning.

24 Your Honor, counsel for the trustee probably
25 inadvertently misstated what our request was. It was not to

1 have a hearing on Mr. Thomas' conduct, rather it was a
2 request to have a hearing on the trustee's conduct in
3 compliance with the order requiring notice.

4 We are aware of Your Honor's opinion. In that
5 opinion Your Honor indicated in passing that Mr. Thomas did
6 not get notice because the trustee's representative saw that
7 they were not in the books and records of the company.
8 Mr. Thomas on the other hand has submitted documents to the
9 Court, including a letter on Lehman Brothers stationery
10 dated December 4th, 2004, which was sent to Mr. Thomas at
11 his address, and Mr. Thomas indicates and the letter
12 indicates -- and we've attached that also to our papers
13 today for convenience, there's so many papers in the case --
14 that this letter indicates essentially that LBI filed
15 (indiscernible - 00:12:37) be getting further notice going
16 forward, and Mr. Thomas in fact did not get further notice
17 of the bar date as Your Honor noted in the opinion, because
18 as I say, the statement made by trustee's representative was
19 that he was not in the books and records. Well --

20 THE COURT: Let me just --

21 MR. COOPER: Sure.

22 THE COURT: -- interject for a moment in reference
23 to this December 4, 2008 letter.

24 MR. COOPER: Yes.

25 THE COURT: The omnibus reply papers of the

1 trustee filed before my decision in July of this year
2 specifically addresses this letter, and indicates that, if I
3 recall it correctly, the trustee did not know who in fact
4 prepared or sent the letter, but that the letter in question
5 is at least enough to put your client on inquiry notice and
6 to take appropriate and diligent action to protect his
7 interests, and in fact there's a phone number and a
8 reference to a website in the letter itself.

9 So the letter is kind of a mixed message from your
10 perspective. It's both actual notice of the need to do
11 something and an indication that nothing was done between
12 this date and the bar date.

13 MR. COOPER: I -- I'm sorry. I understand that,
14 Judge, and it is a mixed message and it does have, you know,
15 perhaps different angles dependent upon how you approach it.
16 But let me take a step back here.

17 It does say in the letter that the claimant would
18 receive future information on how to make a claim, and
19 presumably obviously somebody had the address of Mr. Thomas,
20 he got this letter, he didn't get the subsequent letter.

21 More importantly for this case as I understand it,
22 Your Honor, is that the order that Your Honor had entered
23 some time ago with regard to the service indicated that the
24 trustee shall cause documents in the form annexed to be
25 mailed to persons who as identified from the debtors' books

1 and records may potentially assert claims as customers or
2 general creditors on December 1st.

3 Critically in case of this matter for Mr. Thomas
4 is a creditor or a potential creditor of the debtor, not a
5 customer.

6 Therefore when you look at the governing rules -
7 the governing rules concerning the books and records of a
8 company I would presume that if you're talking about a
9 customer there are customary records in which stock
10 ownership is held and they could look at those records
11 within the prior year. But with regard to the customer --
12 I'm sorry -- with regard to the creditor claim of
13 Mr. Thomas, to the extent that both Your Honor recognized
14 and the rule recognizes that with regard to a claimant a
15 creditor you look to Title 11 general jurisprudence in terms
16 of fair notice and so forth. And I know Your Honor is aware
17 of it and I know that the cases go through it.

18 In the terms of this case where Lehman Brothers or
19 someone on behalf of Lehman Brothers -- I'm not sure how the
20 trustee can just say, well, we didn't know about the letter,
21 that's -- we don't know who sent it, that's fine -- either
22 this letter is a record of the company that the trustee
23 should have reviewed with due diligence to send the notice
24 or the letter at the very least reflects that somebody on
25 some books and records of the company had Mr. Thomas'

1 address.

2 THE COURT: Well, let me just --

3 MR. COOPER: I'm sorry.

4 THE COURT: -- let me just break in, because the
5 letter itself provides some clues. I don't know whether or
6 not the clues are misleading or informative, but the middle
7 paragraph of the letter suggests to a reader that it's a
8 letter prepared by someone with particular reference to the
9 Executive and Select Employees Plan. This is not a form
10 letter that went to anybody else except a member of that
11 class.

12 So a fair reading of the letter is that it put
13 Mr. Thomas on notice that this isn't just about general
14 claims with respect to the SIPA proceeding but rather claims
15 arising out of a particular relationship he must have had
16 with Lehman Brothers in the past and he certainly must have
17 known his employer, assuming he was employed. I don't know
18 if that's in fact true. I don't know when he retired, if in
19 fact he is retired. And I don't know the facts and
20 circumstances that I'm now talking about. I'm simply
21 reading the letter.

22 And it could lead an observer to conclude that
23 there were two kinds of notice being given here, not only
24 the notice with respect to Mr. Giddens and the
25 administration of the LBI SIPA liquidation, but also to do

1 more with respect to protecting his interests that are class
2 based, not individually based, and to find out what, if
3 anything, he needed to do to protect his rights.

4 It to me is not a letter that calls for being
5 Passive, but rather for being active.

6 MR. COOPER: Your Honor, I understand your point
7 and certainly if, you know, a lawyer had read this I think
8 it would have been a different response.

9 I don't know and I would suggest that what we're
10 asking Your Honor to do with -- to these types of questions
11 is to have that evidentiary hearing on that exact question.

12 We're not asking you today to say based upon the
13 record we have here let the claim go in. We're saying
14 there's enough question of fact here as to what the trustee
15 should have done with due diligence.

16 Let me just make one point, not to belabor it. In
17 the subsequent paragraph to that that you reference it does
18 say that at some point in the future the trustee will be
19 sending a publishing notice of the procedures for the filing
20 of claims the day by which those claims shall be filed. So
21 a reasonable person could say, you know, I'm going to wait
22 for that date.

23 Understood that you or I or someone else may have
24 said wait a second, I'm owed a lot of money here, I'm not
25 going to just sit around, I'm going to call and then do

1 this, do that. That's fine.

2 Specifically, Judge, your order compelling notice
3 requires that the trustee cause documents in the forms
4 attached to Exhibit A, B, and C to persons who are
5 identified from the debtors' books and records that they
6 potentially have a claim.

7 Whether this letter comprises that notice it
8 doesn't. I mean it simply doesn't have the A, B, and C, it
9 doesn't strictly comply. And to the extent that this
10 gentleman is a creditor, not a customer, he's entitled to
11 the due process generally in jurisprudence under the
12 Bankruptcy Code Title 11.

13 And what we're asking for today, Judge, is not an
14 ultimate decision, but to say there are enough facts here
15 that don't make any sense, Judge. How could -- how can this
16 letter be here and yet the trustee's representative says
17 they reviewed the books and records but didn't have his
18 address? It just doesn't make sense. What happened, did
19 they not look at the letter? Did they not look at the
20 underlying document that led to this address?

21 We think that under due process under Title 11,
22 not SIPA, but under Title 11 that Mr. Thomas is entitled to
23 an evidentiary hearing on the circumstances.

24 You may decide ultimately that given all that
25 happened here the equities are not in his favor, but we do

1 believe that under these circumstances the equities are in
2 favor of this Court having an evidentiary hearing on the
3 circumstances.

4 THE COURT: But let me follow up on that --

5 MR. COOPER: Sure.

6 THE COURT: -- argument a little bit.

7 Let's just say for the sake of discussion that you
8 conduct some discovery over the questions that we're
9 discussing, including what people worked on collectively
10 (sic), addresses, what diligence went into identifying
11 creditors, what cross-referencing may have taken place
12 between and among various lists in order to come up with a
13 master list. Things of that sort. And let's just say, for
14 the sake of argument, that it is determined -- and here's my
15 hypothetical -- that the notice that went to Mr. Thomas on
16 December 4th on Lehman Brothers' stationery was prepared by
17 someone who was particularly focused on the Executive and
18 Select Employees Plan and had an address list that was
19 limited to participants in that plan. Let's just say for
20 the sake of argument that that's true.

21 And let's also assume for the sake of argument
22 that people on this list, in addition to Mr. Thomas, didn't
23 get actual notice. That might be probative of something.
24 But let's just say that it proved that a whole class of
25 individuals didn't get notice.

1 The curiosity here is that Mr. Thomas is the only
2 claimant at the moment who seems not to have gotten notice.
3 There seems to be no explanation for that.

4 So I have a couple of questions. One is, assuming
5 that there was excusable neglect on the part of the trustee
6 in failing to meld address lists and his name was
7 inadvertently dropped off that list, what does that give you
8 in terms of a right of action to get relief from the bar
9 date if you nonetheless acknowledge that you had actual
10 notice of the SIPA proceeding on December 4, you have a
11 sophisticated client, there's a failure to take diligent
12 action, and a court under the standards of the opinion in
13 July could reasonably conclude that even in those events the
14 facts don't provide a distinguishing excuse?

15 In that event there's no -- the discovery, even if
16 it produces something that might lead to an argument,
17 doesn't necessarily lead to an outcome that benefits your
18 client.

19 MR. COOPER: Understood, Judge. I think -- and
20 two things I've mentioned.

21 I realize that you're just talking in general
22 terms. I don't know if my client would qualify as a
23 sophisticated client, and I'm not trying to be pejorative of
24 Your Honor's characterization or of him, that may be a term
25 of art in this case, it's a very sophisticated case, there's

1 all kinds of issues. He I think was --

2 THE COURT: Did he work for Lehman Brothers?

3 MR. COOPER: No, he worked for a prior company.

4 He worked for one of the prior brokers taking over, I think
5 Shearson, but I think he was a broker. I -- he --

6 THE COURT: Well, generally speaking people who
7 work on Wall Street are pretty sophisticated when it comes
8 to financial matters, or at least they should be.

9 MR. COOPER: I think he worked -- I don't want to
10 (indiscernible - 00:25:12) the record -- I think he work out
11 where he lives now in Texas, I think he was a local broker,
12 and that's not to say he's not working on Wall Street, if
13 you will, I only say that to say that I don't know if that's
14 a standard of response.

15 But more specifically Your Honor's opinion really
16 I think went to the, as you commented, draconian effect of
17 the SIPA notice procedures, and everyone seems to agree they
18 are and Congress made them that way and Your Honor found
19 them to be that way, but my client is a different situation.
20 He is one of these creditors that's not under the -- that's
21 sword of Damocles, so to speak, he's under the Bankruptcy
22 Code's excusable neglect under Pioneer and so forth and so
23 on.

24 I don't know specifically whether to answer your
25 question whether the trustee's conduct could be viewed

1 within the rubric of an excusable neglect. I understood
2 that had to do with the claimant's response, and I'm --

3 THE COURT: Oh, you're absolutely right, I was --
4 I was making a rhetorical flourish, I wasn't -- I wasn't
5 doing anything more than that, I was just suggesting for the
6 sake of argument let's just say they could say, you know, we
7 were dealing with tens of thousands of these creditors and
8 customers, it was the biggest bankruptcy of its kind in the
9 history of the world, we had the LBHI case going on, we had
10 the LBI case going on, the LBI liquidation is the largest
11 broker dealer liquidation in history, we were doing or very
12 best, and in fact we did a great job, we're really sorry in
13 my hypothetical that Mr. Thomas didn't get actual notice,
14 but I think their answer would be we did our best, so what?
15 He didn't get notice, he was on actual notice on
16 December 4th, 2008 any way.

17 MR. COOPER: Understood, Judge, and as I say,
18 ultimately in that second hearing, if you will, whatever the
19 facts were, Your Honor might make that ruling.

20 But specifically this is a man half of whose
21 income -- retirement income is in this fund, it's \$630,000
22 of his own money. My understanding is that he put this
23 money into Shearson and it was managed by Shearson and then
24 Lehman.

25 You know, I -- the -- under the equities of this

1 case I think it's relevant to see what the trustee did. And
2 very specifically whoever signed the declaration saying
3 that, you know, he didn't get notice because he wasn't on
4 the books and records I'd like to ask that person or some
5 representative what they looked at? Did they look at the --
6 did they look at this customer? I mean just to know what
7 they did so Your Honor can weigh and balance the equities.

8 This is a gentleman now who's 65, retired, thought
9 he'd be getting payments over time of over, you know,
10 \$630,000, he's now had to get a job now at a local Wal-Mart
11 to make ends meet. I don't know that those are one of the
12 equities ultimately here, but I do think that this man and
13 the Bankruptcy Code requires due process such that we at
14 least know what the trustee did.

15 It may be that the trustee did everything he
16 possibly could do and he couldn't have found this out and it
17 just dash that's just the way it is. But it could also be
18 that in the size of this case that this poor gentleman got
19 lost in the shuffle and the equities of a creditor in this
20 situation should be allowed the claim. I really doubt it's
21 going to break the bank in terms of paying his creditors.

22 And I'm not trying to be facetious about that,
23 Judge, all I'm saying that the equities should allow this
24 Court to see what the parties did and then Your Honor can
25 make a judgment on those subsequent equities. But I think

1 we ought to know how did they not know this -- how would
2 they not know about this letter?

3 I understand what Your Honor said. Your Honor's
4 order that Your Honor relied upon in order to make the
5 draconian application required specific things to be done,
6 and Your Honor said if you did all these things you're going
7 to be okay. They didn't do these things or they may not
8 have done these things. They clearly didn't give notice to
9 someone whose address is on what seems to be a record and
10 possibly, you know, obviously they've got the address in the
11 books and records. So that's our argument. Not to
12 ultimately determine today but to essentially do what Your
13 Honor is suggesting, to give us a shot.

14 And I'm not talking about massive discovery. I
15 mean Your Honor essentially asked the questions I would be
16 asking. You know, what'd you guys look at? Talk to this
17 person? Did you look at or how'd you cross-reference it?
18 It may be that their protocols were so sophisticated under
19 the circumstances that you say look, you know, I'm sorry
20 this guy got stuck. But it also may be that even if he got
21 stuck because of that that the equities still say under the
22 Bankruptcy Code and its jurisprudence that there's
23 sufficient excusable neglect here and he should be allowed
24 to go forward with his claim.

25 Thank you, Judge.

1 THE COURT: That's your argument.

2 MR. COOPER: That's correct, Judge.

3 THE COURT: I'll hear from the trustee and from
4 SIPA. I think I misspoke, I said SIPA, it's SIPC.

5 MS. GRAGG: Hello, Your Honor.

6 I have a few points in response to Mr. Cooper.

7 One is that -- well, I mean I guess I would just
8 first off start by saying that, you know, we acknowledge
9 that Mr. Thomas did not receive actual notice, that he was
10 not mailed notice of --

11 THE COURT: Do you know why that occurred?

12 MS. GRAGG: He wasn't on the list of potential
13 customers and creditors that was identified by Legacy Lehman
14 employees that was provided to Epiq, the trustee's claims
15 agent. So --

16 THE COURT: Is there a whole class of individuals
17 of this sort who were dropped off the list or was he just
18 one of those unfortunate ones to have missed the opportunity
19 of getting the actual notice?

20 MS. GRAGG: To the trustee's knowledge there is
21 not a class of individuals that was missed.

22 This letter -- and I guess I'll sort of interrupt
23 myself a little bit to just --

24 THE COURT: To talk about the letter?

25 MS. GRAGG: -- to talk about the letter a little

1 bit.

2 So there are a couple points about this letter.

3 This letter indicates that Mr. Thomas is an ESEP claimant
4 potentially, which is this Executive and Selective Employees
5 Plan, we have a number -- numerous claimants who are
6 claiming on the basis of the ESEP in -- participation in
7 several ESEP plans. We've already actually submitted
8 several omnibus objections to those claims seeking to
9 subordinate them under the contractual provisions of the
10 ESEP plan, which is an argument for another date, but we
11 have numerous ESEP claimants in the LBI proceeding.

12 So -- and then the other thing about this letter
13 is it's on Lehman Brothers' stationery. There's actually no
14 indication at all that this was sent by the trustee or
15 Lehman Brothers Inc. It couldn't have been sent by Lehman
16 Brothers Inc. because at that time on December 4th, 2008
17 Lehman Brothers Inc. was in liquidation. So it would have
18 to have been sent by the trustee. This was not sent by the
19 trustee. So we don't know who sent it.

20 We can look for clues too. The phone number -- we
21 called the phone number, that is the phone number to the
22 SIPA -- the SIPA hot line phone number, but the website
23 listed on the bottom is the Chapter 11 holdings website. So
24 we don't know who sent this, but it wasn't the trustee.

25 So this doesn't -- this doesn't -- this doesn't

1 give any evidence that Mr. Thomas was in fact on LBI's books
2 and records and then was missed by the trustee and the
3 trustee's professionals in compiling the list of potential
4 customers and creditors.

5 THE COURT: Let's just say for the sake of
6 argument however -- and I'm not sure if it makes it a legal
7 difference -- that there was neglect on the part of the
8 trustee in failing to include Mr. Thomas' name and address
9 on the mailing that sent out actual notice of the bar date
10 bar date for the SIPA liquidation. And let's say that it's
11 not willful, wanton misconduct, it's just ordinary course
12 we're managing a huge estate, we're really sorry we made a
13 mistake. That kind of error. And let's just say that
14 discovery is taken that proves that there is a mistake of
15 that sort. What would the consequence be?

16 MS. GRAGG: Your Honor, the trustee's position is
17 that there would be no consequences, that's why we don't
18 think that fact discovery is warranted here.

19 SIPA governs the notice requirements here and it
20 does for creditors incorporate Title 11, but Title 11, which
21 ordinary -- as Your Honor recognized in your decision in
22 July -- it ordinarily calls for notice to be given by mail,
23 but bankruptcy courts can decide that notifying creditors by
24 publication is sufficient or desirable under the
25 circumstances.

1 And the claims process order here applied both to
2 customers and creditors and it ordered the trustee to
3 identify potential customers and creditors based on the
4 books and records and also to publish notice in three
5 newspapers of general circulation, which the trustee did.

6 Even if factual discovery were to uncover that
7 Mr. Thomas' address was on the books and records and somehow
8 he was not identified and did not receive notice he still is
9 on constructive notice through publication notice in the
10 newspapers and actually through receiving this mysterious
11 letter.

12 He could have -- he could have easily called the
13 number in the letter, he also -- the SIPA bar date is
14 ascertainable based on the filing date.

15 So unlike a Chapter 11 proceeding where the Court
16 sets the bar date he could have found out the bar date.

17 THE COURT: So there are really two parts to your
18 argument. First that he was on constructive notice. And
19 second, regardless of any negligence on the part of the
20 trustee that could be shown the claimant himself failed to
21 take appropriate action to protect his interests; is that
22 right?

23 MS. GRAGG: Yeah, I think that's right. And also
24 -- yes, that's right.

25 And I guess I would just add that the trustee, you

1 know, regardless of what happened with respect to Mr. Thomas
2 in particular met the requirements of SIPA, which
3 incorporates Title 11 as to him and due process, which
4 requires that the trustee take actions that are reasonably
5 calculated under all the circumstances to apprise interested
6 parties of the proceeding, and in a case of this magnitude
7 where we mailed notice to over 900,000 potential customers
8 and creditors the trustee's position is that he did take
9 actions that were reasonably calculated to apprise
10 interested parties under these circumstances.

11 THE COURT: Okay. Thank you.

12 Mr. Caputo, do you have anything to add?

13 MR. CAPUTO: A few brief comments, Your Honor.

14 Good morning, Kenneth Caputo on behalf of the
15 Securities Investor Protection Corporation.

16 Your Honor, I'm echoing mainly the comments of the
17 trustee, but I'd like to just stress a few points.

18 The standard for notification for general
19 creditors is found in the case law under Title 11, and there
20 seems to be a difference between known creditors and unknown
21 creditors.

22 So the question posed by the Court was what if
23 discovery were to ascertain that the trustee somehow missed
24 it, that Mr. Thomas' address was ascertainable somehow on
25 the books and records, would that matter? And counsel for

1 the trustee indicated that even were that to be the case it
2 would not matter. And we agree. And we agree because of
3 the reasons they stated -- that counsel for the trustee
4 stated that are grounded in the fact that Mr. Thomas
5 received this letter on December 4th of 2008, which apprises
6 him of some very specific information, which differs from
7 the information that creditors receive or had received under
8 the various cases that talk about the standard.

9 In the ordinary bankruptcy the -- under a Chapter
10 11 case under the Code the bar date is not readily
11 ascertainable from the notice that a creditor may receive
12 that a case has begun. It is not readily ascertainable from
13 an initial mailing by the estate. Because that bar date
14 gets -- is set later.

15 But in this letter that Mr. Thomas received from
16 whomever it was it specifies quite clearly that this is a
17 liquidation, and I'll quote, "under the Securities Investor
18 Protection Act of 1970, as amended SIPA." So it gives the
19 individual notice that this is not an ordinary bankruptcy
20 case but in fact a liquidation proceeding under a
21 specialized statute. And the difference under SIPA is that
22 the bar date for filing claims is easily ascertainable
23 because it is set out at six months from the notice.

24 So it is clear to us that Mr. Thomas was at least
25 on inquiry notice with regard to his rights and his remedies

1 in the liquidation proceeding.

2 The only other comment that I'd like to make with
3 regard to Mr. Thomas is that if he's a known creditor or was
4 a known creditor the trustee would have had to taken an
5 action that was capable of determining whether it was
6 reasonably ascertainable that the creditor could be
7 identified through reasonably diligent efforts, and I'm
8 citing the Supreme Court case of Mennonite that is cited by
9 the Third Circuit in Chemtron, which is New Century TRS
10 Holdings case refers to, and the New Century case was found
11 in your opinion on late filed claims that was cited this
12 year.

13 Those cases are very consistent with the result
14 that the Second Circuit has espoused under the Wegner (ph)
15 decision versus City of New York where the court says,
16 "Particularly where mailing is supplemented by other forms
17 of notice, such as posting a publication, the risk of non-
18 receipt is constitutionally acceptable."

19 In this case not only did the trustee undertake
20 reasonably diligent efforts to ascertain the full list of
21 creditors -- and I think in that box the aside is that the
22 Shearson Lehman break up was more than two decades ago --
23 and it is not unreasonable to assume that individuals who
24 participated in that were not readily ascertainable from a
25 standard customer or creditor list that Lehman maintained in

1 2008.

2 The second point is if they weren't they were
3 still receiving constitutionally acceptable notice because
4 the trustee complied with, as counsel for the claimant urges
5 this Court that he must, Title 11, specifically Rule 2002
6 Sub L of the Bankruptcy Rules, which provides for the
7 supplemental notice by publication. And one thing that is
8 grounded again in the Securities Investor Protection Act is
9 that extra step.

10 And here the trustee complied with that by
11 publishing notice in four did newspapers of general
12 circulation throughout the country.

13 One would have to assume that if you didn't know
14 that Lehman Brothers failed in the end of 2008 you were
15 either on a very long vacation or some other fact pattern
16 existed in your life which would have removed you from the
17 mainstream.

18 THE COURT: I thought you were going to say some
19 other planet.

20 MR. CAPUTO: That too would be sufficient. But
21 even if Mr. Thomas was on another planet or in some way
22 incommunicado, on December 4th of 2008 by his own admission
23 he becomes aware of a particular liquidation proceeding
24 under a particular statute which has a very strict time
25 limit, and he is not only on inquiry notice but he is really

1 due bound to take steps -- affirmative steps to protect his
2 interests. He did not and there is no argument that he can
3 make in this case that it constitutes excusable neglect.

4 Because excusable neglect does not apply in a SIPA
5 proceeding under the standards espoused under Pioneer.

6 Thank you, Your Honor.

7 THE COURT: Let me probe what you said just a
8 little bit further.

9 One of the curiosities of the argument is that
10 everybody focuses on the December 4th, 2008 letter to
11 Mr. Thomas, but the trustee necessarily distances himself
12 from the letter because it's not his letter. Can't take
13 credit for the letter. But you are making the argument that
14 whoever authored it put Mr. Thomas on notice that he had
15 some work to do to protect his rights.

16 Let's just say for the sake of discussion that
17 this good Samaritan author of this letter didn't write the
18 letter and the letter was never sent but that Mr. Thomas'
19 identity and address were ascertainable facts from business
20 records and he didn't get notice. Is it your position that
21 publication notice in that circumstance would be adequate?

22 MR. CAPUTO: It is my position that it would be
23 adequate, and I think under the standards espoused by the
24 Second Circuit it would be constitutionally acceptable.

25 Wegner versus city of New York following Maleen

1 (ph) versus Central Bank, and that standard is clear that
2 the publication notice is a sufficient safeguard to provide
3 an individual with notice to satisfy the due process
4 requirements under the constitution.

5 THE COURT: Let's assume further, different
6 hypothetical, that Mr. Thomas' name appears in records and
7 somebody makes a terrible mistake, they get down to the
8 bottom of a page and they turn the page and in turning the
9 page they miss his name and address and we're able to
10 conclude that he has -- he's included in the list, he should
11 have received notice, he didn't receive notice, and he
12 doesn't read general circulation newspapers, he reads only
13 the daily newspaper published in Austin, Texas, which is
14 where he lives. Let's just say that.

15 And let's just say he's working at Wal-Mart
16 because he likes it and the people who go there are not
17 financially sophisticated people for the most part and they
18 don't talk about the Lehman Brothers bankruptcy, they talk
19 about other things. He actually has no notice, but he was
20 entitled to notice. Is it still adequate?

21 MR. CAPUTO: It is. Cases that have discussed
22 various fact patterns that are troubling and difficult to
23 deal with indicate that the policy standards that exist for
24 the statutory subsection of SIPA, which we're talking about,
25 are -- they're important. They are grounded in a need for a

1 prompt and orderly liquidation of the estate, a calculation
2 of what the demand on the fund is. And you'll find in those
3 decisions some very difficult outcomes for investors who
4 claim not to have notice.

5 In one case in particular, for example, in the
6 Southern District of Florida in the case of In re:
7 Government Securities, the Court was faced with a situation
8 where a customer claimant, even a higher standard of
9 creditor -- and again, I think it's somewhat of an aside or
10 a footnote here that the trustee has taken -- filed a number
11 of motions in this case to indicate that even the ESEP
12 claimants in this case are to be subordinated under the very
13 contract. Now that has not been decided, but that is before
14 the Court, and that's where Mr. Thomas would end up, in that
15 same group, which is a potentially subordinated group of
16 creditors even were his claim to be accepted.

17 But nevertheless this one customer claimant in
18 SIPA lived in Peru and did not get actual notice. And the
19 Court determined as a matter of fact that only four copies
20 of the Wall Street Journal were mailed to the nation of Peru
21 on the particular day of notice, and the Court found that to
22 be acceptable notice under the statute and denied the claim.
23 That's a very strict decision.

24 And in this case we know that the hypotheticals
25 that the Court posed, both of them, don't meet the test --

1 or don't meet the facts as we see them before us today, the
2 facts that are in evidence before the Court and upon which
3 the Court can take judicial notice.

4 We believe that it is clear that Mr. Thomas by his
5 own submission indicates that he was on inquiry notice, he
6 received inquiry notice about this proceeding and the
7 particular liquidation proceeding under SIPA. He had more
8 than a hunch that his rights would be affected, and because
9 of the totality of the circumstances here, which the Court
10 already has before it and the evidence is clear, we believe
11 that the Court could determine today that any further
12 inquiry requested even at the eleventh hour of Tuesday night
13 before a court hearing today, even that effort would be
14 futile as a matter of law.

15 THE COURT: Well, that's actually one of the
16 reasons I've been asking these hypotheticals to get to that
17 question.

18 MR. COOPER: Judge, if I may, just very briefly,
19 and just based upon comments by counsel for the trustee.

20 I think what counsel indicated was that among
21 other things -- and I'm assuming this is a proffer -- that
22 they looked to Legacy employees of Lehman Brothers Inc. to
23 determine these various lists. And it's curious, but the
24 letter that we've been talking about, this December 4th
25 letter, has a Lehman Brothers reference on the top but

1 nothing on the bottom.

2 And although I know Your Honor does not have this
3 I'd be happy to hand it up or put it into evidence at an
4 appropriate time.

5 Mr. Thomas received his ESEP account statement on
6 or about March 13th, 2008, and it's signed by a woman named
7 -- a woman I assume -- Erin D'Souza, D apostrophe,
8 S-O-U-Z-A, looks like it has similar to the same top of the
9 page, but the bottom is Lehman Brothers (indiscernible -
10 00:50:38) Americas typical address.

11 So among other things at the very least I'd like
12 to know whether Ms. D'Souza was one of these Legacy
13 employees who compiled the list. Because if she was she had
14 written a letter in March to this gentleman at this address.

15 And I think, you know, whether the constitution
16 permits something doesn't mean that it's fair in this court.
17 I'm sorry. You know there's a fairness here that this
18 gentleman ought to at least be able to understand what the
19 trustee did.

20 Your Honor may well rule ultimately that, you
21 know, that doesn't matter, that he should have done this or
22 that or the other thing, and you know, now I hear his claim
23 by the subject to subordination claims any way, which is
24 obviously another issue, but we're talking about just bear
25 I mean if this system does nothing procedural due process is

1 the essence of it, and here he ought to at least know
2 whether this person, Ms. D'Souza, was one of the people that
3 they talked to and whether she -- I am certain she didn't
4 intentionally leave his name out, you know, but if she made
5 a mistake or someone else made a mistake we ought to know
6 and then evaluate that conduct to see the equities of this
7 case.

8 Thanks, Judge.

9 THE COURT: Thank you.

10 MR. COOPER: And I have a copy. I apologize I
11 didn't -- until coming I didn't realize that Ms. D'Souza had
12 actually signed it or who had done the inquiry. At an
13 appropriate time I can submit it to the Court in affidavit
14 form.

15 THE COURT: I won't need it, but thank you any
16 way.

17 These issues as noted in my decision of July 11,
18 2013 are troublesome in part because the Court is being
19 asked to deal with issues of notice and the requirements of
20 SIPA that are quite onerous with respect to exceptions to
21 the rule that you have six months, it's a strict time limit,
22 and excusable neglect is for all practical purposes an
23 irrelevancy.

24 My decision includes in the conclusion a sentence
25 that applies here as well. I write in declarative words,

1 "It would be an abuse of discretion for the court to grant
2 the exception of relief sought by the respondents." And
3 that applies to Mr. Thomas' request to take discovery.

4 One of the things that the argument has elucidated
5 is that the discovery would be a waste of time, because for
6 all practical purposes, regardless of what the discovery
7 uncovers, the trustee and SIPC will still revert to the same
8 familiar theme, namely it doesn't matter, the individual in
9 question by his own admission was placed on actual notice of
10 the existence of a SIPA case affecting his rights in
11 December of 2008 and then did not take appropriate action.

12 In effect it's as simple as that. And for that
13 reason there's no distinction that I can legitimately draw
14 between Mr. Thomas' situation and those of the other
15 claimants that I considered in my most recent decision on
16 the subject.

17 In fact in the case of one of the claimants,
18 Mr. Monello, I treat a different argument going to the
19 question of whether or not the strict application of the
20 SIPA bar date in his case should be overridden on a standard
21 of manifest injustice, and I found no basis for doing so.

22 So while the outcome is potentially difficult to
23 explain to an individual living in Austin, Texas who could
24 legitimately say, well, I never got actual notice, I never
25 I never read those newspapers, I didn't know about it, but

1 the standards for notice here are still met.

2 So regrettable as it may be and harsh as it may
3 seem the trustee's objection to this claim is sustained as
4 an untimely claim for the reasons stated just now on the
5 record and for the reasons also included in my decision from
6 July.

7 Let's hear from the next claimant.

8 MR. COLLINS: Good morning.

9 THE COURT: Good morning.

10 MR. COLLINS: Patrick Collins, Farrell Fritz on
11 behalf of CA, Inc.

12 The July 11th decision does not mean the
13 disallowance of CA's claim.

14 CA is a known general creditor of LBI for whom
15 notice of the proof of claim bar date was sent to an
16 incorrect address.

17 THE COURT: This went to the lock box?

18 MR. COLLINS: Correct. There was a lock box in
19 Pittsburgh, Pennsylvania maintained by Mellon Bank for the
20 purpose of receiving payments. The lock box was closed in
21 2007, and customers of CA were instructed to send payments
22 to a new lock box that was established in Philadelphia. And
23 the invoices that CA sent to its customers actually in
24 addition to the lock box address for remitting payments
25 provided an address where correspondence was supposed to be

1 sent.

2 Publication notice of the bar date is not
3 sufficient to bar CA, because CA as a creditor, other than a
4 customer, was entitled to receive actual written notice of
5 the bar date in accordance with the Bankruptcy Code and
6 rules, which are expressly incorporated into the SIPA
7 statute.

8 Because CA did not receive actual written notice
9 of the bar date the deadline cannot be a basis for
10 disallowing CA's claim.

11 CA is a leading developer of business enterprise
12 software, it licenses -- it licensed software to LBI and
13 provided maintenance services in connection with those
14 licenses.

15 After receiving notices in 2008 regarding the LBHI
16 cases CA caused a proof of claim and then an amended proof
17 of claim to be filed in the LBHI cases. The amended proof
18 of claim was filed on April 17th, 2009 for \$394,000. CA did
19 not receive the bar date notice concerning the LBI case.

20 In April 2012 LBHI objected to CA's claim
21 asserting that it was not the party liable on CA's claim,
22 and that if anything other Lehman entities that were not
23 subject to the LBHI case were the ones responsible for the
24 CA claim.

25 Upon receipt of LBHI's objection CA investigated

1 its records and determined that the Lehman entity with whom
2 it had contracted was LBI and not LBHI.

3 THE COURT: How could they not have known that it
4 was LBI from the get go? I don't understand how you can be
5 standing here claiming an entitlement to an exception from
6 the bar date when you're dealing with a sophisticated party,
7 you characterized them as a leading developer of software,
8 they clearly weren't living in Austin, Texas at the time and
9 they weren't working at Wal-Mart, they were well aware of
10 what they were dealing with and they didn't know that it was
11 LBI? How could they possibly have been confused about that?

12 MR. COLLINS: Well, many -- much of the
13 correspondence that came out of the LBHI company simply says
14 Lehman Brothers on the top of it.

15 THE COURT: But still this is a -- this is an
16 enterprise that engages in business with any number of
17 sophisticated users of its software. I don't know what the
18 services were that are in question here, but it almost
19 doesn't matter for purposes of my skeptical inquiry.

20 MR. COLLINS: Uh-huh.

21 THE COURT: What's the excuse? It just --

22 MR. COLLINS: I don't think an excuse is
23 necessary, Your Honor. I think --

24 THE COURT: Oh, yes -- oh, yes it is.

25 MR. COLLINS: I'm certainly if you think so, but I

1 -- CA submits that creditors are entitled to actual written
2 notice of the bar date. That's what Title 11 says of the
3 BGI case that we cited in our briefs says that creditors are
4 entitled to actual written notice of the bar date, not you
5 know, an awareness of the -- that the Lehman cases --

6 THE COURT: There are any number of cases that
7 involve parties just like your client that didn't receive
8 actual notice and are still held to the bar date, especially
9 in SIPA cases, and here we have a situation in which notice
10 was in fact given, and by your own admission it was given to
11 a dead letter office as it turns out, but it was given and
12 there was constructive notice and you have a sophisticated
13 client and you have no equitable grounds to say that any
14 special exception should apply to you.

15 So, with respect, I don't understand how you can
16 distinguish yourself from the impact of the July 11, 2013
17 decision, and that's what I set up for this argument. Not a
18 complete recitation of the papers that I've read --

19 MR. COLLINS: The July --

20 THE COURT: -- but an argument -- an argument that
21 actually deals with today's reality.

22 You have a very difficult law of the case problem
23 to overcome, and you haven't done it yet. Try doing it now.

24 MR. COLLINS: The July 11th decision says "that
25 none of the respondents have produced direct and substantial

1 evidence to rebut the presumption that the addressee of a
2 properly addressed and mailed notice actually receives that
3 notice."

4 The presumption doesn't even apply to CA because
5 the bar date notice was sent to a completely wrong address.

6 Unlike all the other parties that came before the
7 Court involved in the July 11th order the bar date -- the
8 mailing of the bar date notice to CA was patently incorrect,
9 sent to a --

10 THE COURT: Okay, let's accept that.

11 MR. COLLINS: Okay.

12 THE COURT: Let's say that it was deficient -- it
13 was a deficient notice, it was an attempt to send notice,
14 your client was on a list and it went to the wrong address.
15 These cases by the way come up all the time. Now what?
16 That's the extent of the argument?

17 MR. COLLINS: The extent of the argument is that
18 CA is entitled to actual written notice of the bar date.

19 THE COURT: Okay. Do you have anything --

20 MR. COLLINS: Of the bar date, and if --

21 THE COURT: Do you have anything --

22 MR. COLLINS: -- the mailing --

23 THE COURT: That's -- your papers say that too.
24 Do you have anything more to say with respect to -- to this
25 question?

1 MR. COLLINS: No, since the mailing was
2 insufficient the publication does not rescue it, because
3 under Title 11 known creditors are entitled to notice by
4 mail. The publication can be a supplement, but under the --
5 I disagree with Mr. Caputo's characterization of the Maleen
6 decision, I believe the Maleen decision dictates that known
7 creditors receive notice by mail in addition to notice by
8 publication if they are known. That's what it holds.
9 Publication is only for unknown creditors.

10 THE COURT: Well let's just say for the sake of
11 discussion that the notice was given consistent with LBI's
12 books and records, but it turns out to be in your example an
13 incorrect address. I suspect that what I'll be hearing from
14 the trustee -- I don't want to anticipate their argument,
15 but I've heard it before -- is that that's sufficient. That
16 there's no duty that the trustee has to look beyond the
17 books and records of the broker dealer. And if your
18 address, the lock box address, was in fact the address
19 maintained at LBI, and if your client didn't even know that
20 it was dealing with LBI I don't really understand your
21 argument anymore. Because notice was given and your client
22 seems to have been negligent in not even understanding who
23 its counterparty or client was.

24 MR. COLLINS: If -- if CA had received the LBI bar
25 date notice timely CA would have had both of the notices in

1 front of them and had been able to ascertain that there are
2 distinctions between the two and that you need to drill down
3 to the granule level to figure out which entity.

4 And with regard to the trustee's argument, which I
5 heard in response to the discussion on Mr. Thomas regarding
6 whether it would matter if the address in LBI's books and
7 records is the wrong address, I think it does matter.

8 Under the SIPA statute the notion that the trustee
9 all the trustee needs to do is send mailings to the address
10 shown in the debtors' books and records that applies to
11 customers, it doesn't apply to creditors. That sentence is
12 in reference to customer claims. That sentence is not in
13 reference to creditor claims.

14 So I think we're moving under Title 11 with
15 respect to the notice issue, Title 11 governs, and a
16 creditor is entitled to receive notice at the correct
17 address.

18 THE COURT: Okay. I understand your argument.

19 MR. COLLINS: Okay.

20 THE COURT: I'll hear from the trustee and from
21 SIPC if anything needs to be added.

22 MS. GRAGG: I'll actually keep my response very
23 brief.

24 I think our -- the trustee's reply lays out our
25 position very clearly on CA, Inc.'s argument, in particular

1 the decision of the Bankruptcy Court for the Northern
2 District of Illinois In re: Chicago Partnership Board, Inc.
3 should apply to CA's case.

4 In that case the facts were substantially similar.
5 The trustee sent notice to the claimant's lock box address
6 as in this case. That address was identified by the
7 trustee's claims agent based on the broker dealer's books
8 and records.

9 As in that -- as in this case in that case the
10 trustee did not receive any -- any unreturned mail notice as
11 a result of having mailed the notice to the lock box.

12 And most importantly in that case and in this case
13 there was notice by a publication, and the In re: Chicago
14 Partnership Board court found that regardless of whether the
15 claimant received actual notice by mail that notice by
16 publication was sufficient under SIPA and due process
17 requirements.

18 THE COURT: What do you say to the argument that
19 Title 11 notice requires that there be actual delivery of
20 written notice of the bar date to CA?

21 MS. GRAGG: Title 11 requires that there be mailed
22 notice to known creditors. The trustee mailed notice to CA,
23 Inc. at its address as it appeared on LBI's books and
24 records. In a case such as this receipt of -- actual
25 receipt of mailed notice is not required.

1 THE COURT: And it doesn't matter that the notice
2 was sent to a closed lock box?

3 MS. GRAGG: No. And Title 11, as this Court
4 recognized in its July decision, allows for the Bankruptcy
5 Court to order notice by a publication if it's desirable and
6 appropriate under the circumstances, which this Court did in
7 the claims process order, which applied to both general
8 creditor and customer claims.

9 THE COURT: Okay. Thank you.

10 Mr. Caputo, do you have anything to add?

11 MR. CAPUTO: Just briefly, Your Honor. Kenneth
12 Caputo on behalf of Securities Investor Protection
13 Corporation.

14 Your Honor, in its papers C -- I think a key point
15 that counsel for the trustee just made is that CA, Inc.
16 ignores Bankruptcy Rule 2011 -- 2002 Sub L which provides
17 for that supplemental notice by publication. And if at any
18 rate that occurred here, and that's a fact that can't be
19 avoided.

20 They rely on three cases. And the first case is
21 Green River Biodiesel from the Northern District of Alabama.
22 It's a Chapter 11 case. And it involves notice sent to a
23 lock box address, but it does not deal with additional
24 notice by publication and the policy implications underlying
25 the strict time limits in SIPA.

1 The second case they cite is Spring Ford
2 Industries from the Eastern District of Pennsylvania.
3 Again, a Chapter 11 case, it involves excusable negligent.
4 Also not applicable here. And it does not deal with the
5 additional notice by publication and the policy implications
6 underlying the strict time limitations in SIPA.

7 And the third case they deal with, which is very
8 curious, is Breen (ph) versus Baltimore Gas & Electric, or
9 as referred to by counsel, the BG&E case, and that case
10 deals with a willful violation of the automatic stay and
11 just some dicta about mailing by BG&E. Not a controlling
12 case.

13 But one case that is particularly imformative was
14 a case I litigated that counsel referred to, which was the
15 Chicago Partnership Board case, and in that case there was a
16 mailing to a lock box that was not the proper receipt for
17 all notice to that debtor -- to that creditor, and the Court
18 found that nevertheless notice was complied with for two
19 reasons. The trustee complied with his obligation to mail
20 notice, he did that to the address that they had on the
21 books and records, and he published notice.

22 CA is seeking equitable relief here by the Court,
23 an exception to the very strict limits.

24 I think it's notable that in its response at
25 paragraph 9 that it -- and I'll quote -- "It mistakenly

1 identified the debtor as LBHI instead of LBI in its proof of
2 claim." It made the mistake in its papers and we point this
3 out in our brief at page 14, footnote 9.

4 You can readily ascertain from the affidavit that
5 CA, Inc. submitted that there are no fewer than four
6 instances where it can be clearly discerned on the face of
7 the document that the counterparty was LBI.

8 As Your Honor held in the decision in July, SIPA
9 does not tolerate the garden variety excuses for failure to
10 comply with the strict time limitations. It should not
11 tolerate it here and we respectfully submit that the
12 objection by CA, Inc. to the trustee's motion should be
13 denied.

14 THE COURT: Thank you.

15 MR. COLLINS: May I reply briefly, Your Honor?

16 THE COURT: Sure.

17 MR. COLLINS: Further to the question of, you
18 know, how CA could be confused as to who its obligor was.
19 Lehman Brothers Holdings scheduled claims in favor of CA on
20 its bankruptcy schedules and only years later amended its
21 schedules to delete those claims. So it's not as if there
22 wasn't a basis for CA to believe that Lehman Brothers
23 Holdings might be the obligor on the claim. And that's set
24 out in our papers.

25 Our response papers cite the BGI, Inc. case, 476

1 Bankruptcy Reporter 812 that says "that adequate notice
2 entails actual written notice of the bankruptcy filing in
3 the bar date," and that is a Chapter 11 case. And also the
4 Drexel Burn & Lambert (ph) group case, 151 Bankruptcy
5 Reporter 674, which says essentially the same thing.

6 They've discussed the Chicago Partnership Board
7 case in support of a proposition that a notice sent to a
8 lock box is sufficient under SIPA. The reason CA didn't
9 cite that case is because we don't think it applies. It
10 involves a customer, not a general creditor. It involved a
11 mail drop maintained by the claimant, not a lock box
12 maintained by a third-party bank. And more importantly the
13 lock box here was closed. The lock box was closed in 2007
14 and moved to an entirely new address.

15 THE COURT: Okay, but let's -- let's focus on
16 Mr. Caputo's argument. I think what he's saying is that it
17 doesn't matter, and I believe that what he is saying is that
18 if notice is actually sent to a bad address but notice is
19 supplemented by publication that's all you need to do as
20 long as that bad address is within the business records of
21 the broker dealer.

22 And if that's true you lose, because all of these
23 distinguishing characteristics don't matter. Actual notice
24 for these purposes, the actual receipt at the proper address
25 of a bar date notice is not a requirement when applying the

1 SIPA bar date. And in effect I don't think you can get out
2 from under that argument, even though you are making an
3 equitable argument and I understand why you're making it.

4 But it's also true that your client, as stated in
5 paragraph 9, determined that it mistakenly identified the
6 debtor as LBHI.

7 So with all respect you're not going to prevail
8 today, and the grounds for it are set forth in the July
9 opinion and the colloquy of today's hearing.

10 MR. COLLINS: Would you like me to respond, or are
11 you --

12 THE COURT: No, actually what I just said is --
13 I've ruled and you might as well sit down.

14 MR. COLLINS: Okay, I understand that, that's why
15 I asked.

16 THE COURT: But I'd like to hear from Mr. Caputo
17 if I have correctly characterized his legal position,
18 because I believe that is what it is.

19 MR. CAPUTO: You did, Your Honor, quite well.
20 Thank you very much.

21 THE COURT: Okay. And I accept it. I believe
22 that is the proper interpretation of the provisions of SIPA
23 that are interpreted in my most recent decision on the
24 subject.

25 MR. COLLINS: Thank you, Your Honor.

1 THE COURT: Okay. Thank you for the argument.

2 What's next?

3 MR. EPSTEIN: Good morning, I'm Adam Epstein, I am
4 a -- I had a brokerage account at Lehman, it had some shares
5 in it. I thought that my risk was in the underlying
6 companies that I bought the shares in, not in the custodian
7 of my account. I guess I was wrong.

8 I was here in June and I've heard several people
9 make arguments as to why they case should be allowed, and
10 I've read -- I heard Mr. Caputo make several convincing
11 arguments as to why they should not be, and I've read
12 through your opinion in July that says you have very little
13 to no discretion in these matters.

14 I'm here today to make two points.

15 One is I believe my case is fundamentally
16 different from all that we've heard thus far, and because of
17 the circumstances in my case my claim ought to be allowed.

18 And number two is Mr. Caputo had offered some
19 interpretations of what Congress' intent was and the dire
20 consequences should a late filed claim ever be allowed. I
21 have a different interpretation of those things.

22 So first of all the particulars of my case I
23 thought that my account had been transferred to Barclays.
24 Why did I think that? Because they told me it had. I got
25 lots of letters from Barclays in '08 and '09 saying welcome

1 to Barclays. Here's one of them I got from Barclays with my
2 Barclays' account number on it and my Barclays' financial
3 information.

4 THE COURT: So what happened?

5 MR. EPSTEIN: I -- well -- and here's more. Years
6 later I realized I had not received a statement from
7 Barclays in a while. I called them up and said, what's
8 going on with my account, I moved, maybe you don't have any
9 current address. And they said, well, we don't have a
10 record of you ever being a client of ours, talk to Lehman.
11 I talked at a Lehman and they said, well, you have to file a
12 claim, but it's too late, it's a late filed claim any way so
13 it doesn't matter. So that's why I'm here today.

14 THE COURT: And your claim is a -- would be a
15 customer claim?

16 MR. EPSTEIN: A customer -- it was broker's
17 account, yeah.

18 THE COURT: Got a brokerage account, you had
19 securities in your account?

20 MR. EPSTEIN: Yes.

21 THE COURT: It started out small and it ended up
22 small --

23 MR. EPSTEIN: Yes.

24 THE COURT: -- if I remember correctly. You
25 started out with about 1,000 and you ended up with about

1 5,000 and change.

2 MR. EPSTEIN: Yes.

3 THE COURT: Okay. I don't understand what
4 happened.

5 MR. EPSTEIN: I don't either, but I do know that
6 they sent me letters well after the bar date from Barclays
7 saying, dear client. Now no wonder I thought I was a bar
8 clays client.

9 Now the backdrop of which I'm getting these
10 letters Mr. Caputo has argued that Barclays -- that Lehman
11 is the biggest bankruptcy of all time, you had to have known
12 when it happened unless you were living on a different
13 planet.

14 What I interpret, what I saw was that Barclays
15 had bought Lehman. There were articles all over the press
16 about that. I did some Goggling recently, there were over
17 100 articles in the New York Times about Barclays buying
18 Lehman in a two-week period. In fact it was global news. I
19 looked globally, I looked country by country. Here's an
20 article from Albania saying Barclays has bought Lehman.
21 Here's an article from Bangladesh. You can go
22 alphabetically by country. Cambodia.

23 THE COURT: We actually don't usually do that.
24 I'll take judicial notice --

25 MR. EPSTEIN: Okay.

1 THE COURT: -- that everybody in the world knows
2 about it.

3 MR. EPSTEIN: Everybody in the world knew that
4 Barclays had bought Lehman, and that's why I thought
5 Barclays had my account. It turned out not to have been the
6 case apparently or a mistake was made somewhere.

7 Now everything that I've heard thus far talks
8 about errors that the claimant makes. There are no
9 excusable errors that a claimant makes, that's too bad.

10 What -- there was some subtext of what you were
11 saying was errors of omission by the trustee. If they had
12 not sent out those letters, if they had not filed the
13 articles in the newspaper then presumably they wouldn't be
14 allowed to take the funds.

15 But a whole different category that we haven't
16 talked about is errors of commission. They made a crucial
17 mistake here in giving my account information to Barclays.
18 If Barclays wasn't buying my account or taking my account
19 why did -- Lehman had no business in giving them my account
20 information. And the fact that they did that, that they
21 committed a crucial mistake led to where we are today.

22 THE COURT: Okay. I understand your argument and
23 it does seem different to me, so let's hear what the trustee
24 has to say.

25 MS. GRAGG: Your Honor, I would start off by

1 saying that notice was mailed to Mr. Epstein at his mailing
2 address as it appeared on LBI's books and records. This was
3 the same mailing address that appears on the account
4 statement that he submitted with his late-filed claim.

th

5 He, in his papers in response to our 28
6 objection, asserted that he didn't receive notice possibly
7 because he had moved. This is actually the first time that
8 we're hearing what his belief that his account was
9 transferred was based on. I've never seen any of the
10 statements from Barclays that he's referring to today.

11 THE COURT: Do you think it would be worthwhile to
12 adjourn this particular matter so that you can examine these
13 facts?

14 MS. GRAGG: I don't because of the Adler, Coleman
15 (ph) decision of the Southern -- Bankruptcy Court for the
16 Southern District of New York from 1997.

17 In that case claimants, Laird and Susan Kelly,
18 were mailed notice of the SIPA proceeding. They also
19 believed that their account had been transferred. And in
20 fact I think it was supposed to have been transferred, but
21 Adler, Coleman failed to -- failed to successfully transfer
22 the account.

23 The Court in that case found that while it was
24 unfortunate that the Kellys didn't understand their
25 obligations to file a claim in the proceeding based on their

1 belief that their account had been transferred, their
2 failure to timely file a claim did not fit with any of the
3 exceptions to SIPA's mandatory six-month bar date.

4 THE COURT: Okay. One of the things about the
5 SIPA bar date, it sure does have a lot of unfair
6 repercussions when applied on an individual basis.

7 Mr. Caputo?

8 MR. CAPUTO: Kenneth Caputo on behalf of
9 Securities Investor Protection Corporation.

10 And the first comment I have is yes, it does have
11 some very adverse consequences. It is a very strict
12 statute.

13 And I said at the outset of my argument in the
14 June hearing that this is never a good day when SIPC has to
15 come before the Court and argue that claimants should be
16 denied protection under a statute that is designed to afford
17 protection to investors simply because they are late. But
18 that is the law and that's the law that we are duty bound to
19 uphold. It is a strict law.

20 THE COURT: I understand, and when I wrote the
21 decision that we've been referencing I felt that it was a
22 harsh decision as to the claimants that were affected, and I
23 think that the decisions I've made today so far are harsh
24 decisions.

25 We're now dealing with an individual claimant who

1 has a \$5,000 customer account and he has documentation that
2 he's holding that appears to be from Barclays welcoming him
3 as a customer. And I have an argument from the trustee that
4 he received actual notice of the bar date.

5 But here's the question. Assume for a moment that
6 notice was proper, and assume as a result that the bar date
7 should be strictly complied with. Why isn't it a excuse
8 that this particular claimant, Mr. Epstein, was lulled into
9 a sense of I don't really have a problem with my account
10 because it appears to have been transferred to Barclays when
11 they bought Lehman Brothers? So maybe it's safe for me to
12 disregard this piece of paper that must have been sent to me
13 in error. Of course he didn't get it because it went to the
14 wrong address. But let's just say we're mixing those two
15 messages and he either didn't get the notice, which is what
16 he claims, or he did get the notice but he disregarded it,
17 which is my hypothetical.

18 Isn't the fact that he was given good faith
19 information that was unintentionally so misleading? It was
20 legitimate Barclay stationery welcoming him as a customer.
21 What am I supposed to do with that?

22 MR. CAPUTO: It's difficult in a third party
23 provides information to an individual that is potentially
24 misleading. But as counsel for the trustee stated in the
25 Adler, Coleman case, we -- the Court had already addressed

1 that type of a claim, a very specific claim by the Kellys.
2 I litigated that case. Another tough case. Their account
3 was transferred from Alder, Coleman, a clearing firm, to a
4 new clearing firm pursuant to an account agreement and they
5 had received notice that it had moved, but because of some
6 peculiar circumstances the account bounced back to Adler,
7 Coleman as is the case here.

8 And the notice that the individuals were given and
9 that was sent to his address -- and again, I think -- I
10 believe it's the same address that he submitted his
11 objection from, the mailing was made to the same exact
12 address, why he didn't get it we don't know -- but the very
13 difficult result was that the Kellys were found not to be
14 permitted an opportunity to pursue a claim because they were
15 late.

16 And in this case the strict result is that
17 Mr. Epstein falls under that same unfortunate result.

18 THE COURT: Okay. I understand. Thank you.

19 MR. CAPUTO: Thank you.

20 THE COURT: Mr. Epstein, I don't know there's much
21 more to say, and this is one of those times when I wish
22 there was more that I could do.

23 The sentence that I read earlier applies to you.
24 It's -- it's regrettable and I wish it weren't so, but when
25 I spent some time this summer considering the other

1 claimants whose cases I heard that led to the issuance of
2 the decision on July 11 I struggled to come up with a way
3 that I could do something to help claimants like yourself.

4 And I concluded based upon my careful evaluation
5 of the applicable law and the underlying policy of the SIPA
6 statute that it would be an abuse of discretion for me to
7 grant any exceptional relief, and regrettably that applies
8 to you as well.

9 And so I'm sorry to say that even with the obvious
10 pieces of paper that I could see you holding that are
11 obviously Barclays' documents and that gave you a reason to
12 believe that you were secure, it turns out that you're not
13 and I'm sorry about that.

14 MR. EPSTEIN: May I reply to two comments that
15 they just made that are new today, if I may just as long as
16 I'm here?

17 What he said is that they can't be held
18 responsible for a mistake that a third party makes, they're
19 not responsible for what Barclays does for me is what he
20 said.

21 The only way that Barclays got my information is
22 that if Lehman gave it to them. That was the crucial
23 mistake. They had no business giving my account information
24 to somebody else unless they were actually selling the
25 account.

1 THE COURT: Well, as Mr. Caputo said, something
2 similar to that happened in the Adler, Coleman case, and the
3 same result unfortunately occurred.

4 So I can't -- I can't tell you that this feels
5 Fair, because it's quite the opposite, it feels unfair, but
6 there's nothing I can do about it.

7 MR. EPSTEIN: And he said just now in the Adler,
8 Coleman case that it bounced back. Is there a time limit on
9 it bouncing back? What if today all of the Barclays'
10 accounts, the 110,000 that were transferred all of a sudden
11 bounced back, would that have been too long a period to
12 wait? I mean what's too late to wait for a bounce back?
13 I'd still be imperiled if I were a Barclays customer that
14 had actually been transferred.

15 THE COURT: Well, there's another element of this
16 and I don't mean to get into it, but one of the arguments
17 that the trustee made in his papers was that you didn't do
18 much to monitor what was going on in the account after you
19 believed it was transferred. And I don't want to make that
20 something we're going to talk about now.

21 Suffice it to say I have concluded that you have
22 compelling equitable arguments, but they don't suffice to
23 override the statute.

24 MR. EPSTEIN: In your July opinion you said I have
25 no discretion and then you hypothetically said in a couple

1 cases it could conceivably happen such as quote "a life
2 threatening accident or an unexpected serious medical
3 emergency." I'm not claiming those. But what I am claiming
4 is that what you might want to add to that list of things is
5 a critical mistake on the part of a trustee.

6 THE COURT: Well, I'm not sure that we have a
7 critical mistake on the part of the trustee.

8 MR. EPSTEIN: Well they gave my information to
9 them.

10 THE COURT: What we have is something that
11 resulted in your being misled. Whether or not that's
12 sufficient cause to override a bar date when you were given
13 notice of the bar date is a debatable proposition.

14 What I think I will do is at least give the
15 trustee an opportunity to take a look at the paperwork and
16 consider the particular facts that you have at your disposal
17 concerning what happened in your situation to see if with
18 informal discovery between the two of you anything can be
19 done jointly to suggest an exception in this instance.

20 Based upon the law as I have described it I don't
21 see a basis for that exception, but I think you should have
22 an opportunity to discuss this question with counsel for the
23 trustee at the conclusion of the hearing, and I think we
24 should move on to the next matter.

25 MR. EPSTEIN: Thank you.

1 THE COURT: Which is ZPR. Is anyone --

2 MR. UNRAD: Your Honor --

3 THE COURT: Is anyone here on --

4 MR. UNRAD: Yes, Your Honor, Tal Unrad of Levinson
5 on the phone.

6 THE COURT: You're doing this by telephone?

7 MR. UNRAD: Yes, Your Honor.

8 THE COURT: Where are you?

9 MR. UNRAD: I'm located in Boston.

10 THE COURT: Excuse me?

11 MR. UNRAD: In Boston.

12 THE COURT: Okay.

13 MR. UNRAD: Your Honor, first off I appreciate
14 your allowing me to appear on behalf of ZPR by telephone,
15 and having heard the arguments previously proffered to the
16 Court today I will quickly bypass the actual notice argument
17 which is quite similar to Mr. Thomas' argument in which ZPR,
18 like Mr. Thomas, did not receive actual notice and that's
19 acknowledged by the trustee.

20 Moving beyond that to the constructive notice
21 Argument. While other parties may have received
22 constructive notice giving rise to an inquiry notice based
23 on the fact that people the world over knew that Lehman
24 Brothers was in bankruptcy, our client looked at that
25 information and quickly concluded their inquiry based on the

1 fact that they had not received anything from LBI but had in
2 fact received something from LBHI.

3 So like CA and other claimants ZPR filed a claim
4 in the LBHI case.

5 What distinguishes ZPR is the fact that they
6 received no actual notice to the contrary that LBI, as
7 opposed to LBHI, was the correct debtor entity with which
8 they had been doing business.

9 The one flaw as you pointed out to CA, the flaw in
10 our claim is that we, as ZPR, did not actually know who we
11 were doing business with.

12 And it's our position that the LB paperwork,
13 including the contract, which for two sophisticated parties
14 to enter into a one-page contract, which I'm looking at now,
15 which simply says the name of the vice president and signed
16 for Lehman Brothers with an address, no corporate
17 distinction added onto that actual contract language for
18 the --

19 THE COURT: Let me just break in, I'm looking at
20 that contract language now, and I don't know that it
21 matters, and that's part of the problem.

22 You billed it to Lehman Brothers, you dealt with
23 Lehman Brothers, but of course the ZPR international
24 letterhead appears to have written Lehman Brothers itself,
25 and the contract appears to be something that was prepared

1 by you.

2 So the informality of the contract appears to be a
3 function of ZPR's drafting. In fact this could be proof of
4 negligence at the beginning in not having identified with
5 specificity your counterparty.

6 MR. UNRAD: I would agree that it could be
7 negligence on the part of ZPR, but I believe that's overcome
8 by the negligence of LBI in this situation.

9 Like others have presented LBI is a party here
10 which has unclean hands. They have not pursued creditors
11 with the diligence that they should have, they should have
12 taken notice of who their actual clients were.

13 THE COURT: Well, let me cut you off right now.
14 We're not making an unclean hands argument here.

15 This is a strict application of a legal
16 requirement, you have not distinguished your situation from
17 that of every other creditor that we have been dealing with
18 both today and at the earlier hearing that resulted in the
19 July 11th decision.

20 I've considered your argument, I've looked at the
21 papers, and I don't see an excuse.

22 MR. UNRAD: I understand the Court's position, and
23 as I've stated I believe the distinction is the inaccurate
24 information which LBI had which resulted directly in our
25 filing a claim in the wrong case.

1 THE COURT: Does the trustee have anything to say?

2 MS. GRAGG: No, Your Honor.

3 THE COURT: Does the -- does SIPC have anything to
4 say?

5 MR. CAPUTO: Nothing to add, Your Honor.

6 THE COURT: Okay. The disposition of the ZPR
7 claim is the same as that of other similarly situated
8 claimants.

9 The trustee's objection to the claim is sustained
10 substantially for the reasons provided in the colloquy of
11 today's hearing and in the written decision of July 11,
12 2013.

13 And we're adjourned.

14 MR. UNRAD: Thank you, Your Honor.

15 (Whereupon, these proceedings concluded at 11:45 a.m.)
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I N D E X

RULINGS

	Page	Line
Plan Administrator's Omnibus Objection to Claims Filed by Deborah E. Focht [ECF No. 34303]	8	6
Trustee's Twenty-Eighth Omnibus Objection to General Creditor Claims (Late-filed Claims) [LBI ECF No. 5775] - Stephen H. Thomas	37	17
Trustee's Twenty-Eighth Omnibus Objection to General Creditor Claims (Late-filed Claims) [LBI ECF No. 5775] - CA, Inc.	51	87
Trustee's Twenty-Eighth Omnibus Objection to General Creditor Claims (Late-filed Claims) [LBI ECF No. 5775] - Adam Epstein	62	14
Trustee's Twenty-Eighth Omnibus Objection to General Creditor Claims (Late-filed Claims) [LBI ECF No. 5775] - ZPR International, Inc.	66	6

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3
4
5
6
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8
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14
15
16
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C E R T I F I C A T I O N

I, Dawn South, certify that the foregoing transcript is a
true and accurate record of the proceedings.

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Veritext

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Date: September 27, 2013

[& - address]

Page 1

&	19th 10:9	4	accept 43:10 51:21
& 3:2,16 4:15 5:5 10:5 11:22 48:8 50:4	1st 14:2	4 12:23 19:10	acceptable 30:18 31:3 32:24 34:22
0	2	408 69:9	accepted 34:16
00:12:37 12:15	200 69:12	42914 6:13	accident 62:2
00:25:12 20:10	20005-2215 4:4	42915 6:13	account 36:5 52:4,7 52:23 53:2,8,17,18 53:19 55:5,17,18,18 55:19 56:3,8,19,22 57:1 58:1,9 59:2,4,6 60:23,25 61:18
00:50:38 36:10	2002 31:5 47:16	42916 6:13	accounts 61:10
02110-1624 4:18	2004 12:10	476 49:25	accurate 69:4
07039 3:20	2007 39:21 50:13	4th 12:10 18:16 21:16 25:16 29:5 31:22 32:10 35:24	acknowledge 19:9 24:8
08 52:25	2008 12:23 21:16 25:16 29:5 31:1,14 31:22 32:10 36:6 38:11 40:15	5	acknowledged 63:19
08-01420 1:11	2009 40:18	5,000 54:1 58:1	act 9:12 29:18 31:8
08-13555 1:5	2011 47:16	51 67:16	acting 8:15
09 52:25	2012 40:20	5775 2:6 67:11,16 67:20,24	action 13:6 19:8,12 27:21 30:5 38:11
1	2013 1:20 5:16,18 5:25 6:18,22 7:13 37:18 42:16 66:12 69:15	580 69:13	actions 28:4,9
1,000 53:25	20th 6:23	6	active 16:5
100 3:19 54:17	21st 5:19	6 67:7,25	actual 9:16 13:10 18:23 19:9 21:13,15 24:9,19 26:9 34:18 38:9,24 40:4,8 42:1 42:4,8 43:18 46:15 46:19,24 50:2,23,24 58:4 63:16,18 64:6 64:17 65:12
10004-1482 3:12	22nd 6:1,6	62 67:20	adam 4:23 52:3 67:20
10153-0119 3:5	24 9:7	630,000 21:21 22:10	add 27:25 28:12 47:10 62:4 66:5
10:04 1:21	24th 7:1	65 22:8	added 45:21 64:17
11 9:20 11:16 14:15 17:12,21,22 25:23 26:20,20 27:15 28:3 28:19 29:10 31:5 37:17 42:2,16 44:3 45:14,15 46:19,21 47:3,22 48:3 50:3 60:2 66:11	25th 6:3,4,10 7:4,17	66 67:25	addition 18:22 39:24 44:7
110,000 61:10	26 1:20	674 50:5	additional 5:21 8:9 47:23 48:5
11501 69:14	26th 7:14	6th 6:21	address 12:11 13:19 15:1 17:18,20 18:18 19:6 23:9,10 26:8 27:7 28:24 32:19 33:9 36:10,14 39:16 39:24,25 43:5,14 44:13,18,18,18 45:6
11556-1320 4:11	27 69:15	7	
11:45 66:15	27th 6:21	767 3:4	
11th 39:12 42:24 43:7 65:19	28 56:5	8	
125 4:17	28th 5:18,25 10:6	8 67:7	
1320 4:10	293 3:18	800 4:3	
13th 6:17 36:6	29th 5:16 7:13	805 4:2	
14 49:3 67:20	3	812 50:1	
151 50:4	34303 2:2 5:17 67:7	87 67:16	
15th 4:2	34380 6:17	9	
16th 7:6	34381 6:17	9 48:25 49:3 51:5	
17 67:12	35026 5:21	900,000 28:7	
17th 7:5,8 40:18	36737 6:8	a	
1970 29:18	36993 6:14	a.m. 66:15	
1997 56:16	37 67:12	aaert 69:9	
	38138 7:3	able 33:9 36:18 45:1	
	38147 6:25	absence 9:13	
	38796 7:8	absolutely 21:3	
	394,000 40:18	abuse 38:1 60:6	

[address - bar]

Page 2

<p>45:7,9,17 46:5,6,23 47:23 48:20 50:14 50:18,20,24 53:9 56:2,3 58:14 59:9 59:10,12 64:16 addressed 43:2 58:25 addressee 43:1 addresses 13:2 18:10 adequate 32:21,23 33:20 50:1 adjourn 56:12 adjourned 5:24 6:2 6:15 7:4,12,16,21 10:8 66:13 adjournment 5:24 6:20 7:19 8:10 adjournments 9:9 9:11 adler 56:14,21 58:25 59:6 61:2,7 administered 1:6 administration 15:25 administrator 5:15 5:23 6:1,7,20 7:1,9 7:25 8:3 administrator's 5:7 5:20 6:5,10,24 7:7 7:12,15,18,22 administrator's 2:1 67:5 admission 31:22 38:9 42:10 adverse 57:11 advised 8:15 affidavit 37:13 49:4 affirmative 32:1 afford 57:16 afternoon 8:13 agenda 5:6 9:21 agent 24:15 46:7 ago 13:23 30:22 agree 8:6 20:17 29:2,2 65:6</p>	<p>agreed 6:20 agreement 59:4 al 1:7 alabama 47:21 albania 54:20 alder 59:3 allow 8:5 11:13 22:23 allowed 22:20 23:23 52:9,17,20 55:14 allowing 63:14 allows 47:4 alphabetically 54:22 amended 6:4,23 7:2 29:18 40:16,17 49:20 americas 36:10 amounts 8:22 angles 13:15 annexed 13:24 answer 20:24 21:14 anticipate 44:14 anybody 15:10 anymore 44:21 apart 10:18 apologize 37:10 apostrophe 36:7 apparently 55:6 appealable 10:14 appear 8:8,17,17 9:12 63:14 appeared 46:23 56:2 appears 33:6 56:3 58:2,10 64:24,25 65:2 applicable 48:4 60:5 application 23:5 38:19 65:15 applied 11:1 27:1 47:7 57:6 applies 37:25 38:3 45:10 50:9 59:23 60:7</p>	<p>apply 32:4 42:14 43:4 45:11 46:3 applying 50:25 appreciate 5:14 63:13 apprise 28:5,9 apprised 10:15 apprises 29:5 approach 13:15 appropriate 13:6 27:21 36:4 37:13 38:11 47:6 april 6:3,6,10 40:18 40:20 argue 57:15 argued 54:10 argument 7:10 18:6 18:14,20,21 19:16 21:6 23:11 24:1 25:10 26:6 27:18 32:2,9,13 38:4,18 42:17,20,20 43:16 43:17 44:14,21 45:4 45:18,25 46:18 50:16 51:2,3 52:1 55:22 57:13 58:3 63:16,17,21 65:14 65:20 arguments 9:14 11:9 52:9,11 61:16 61:22 63:15 arising 15:15 art 19:25 article 54:20,21 articles 54:15,17 55:13 ascertain 28:23 30:20 45:1 49:4 ascertainable 27:14 28:24 29:11,12,22 30:6,24 32:19 aside 30:21 34:9 asked 23:15 37:19 51:15 asking 16:10,12 17:13 23:16 35:16</p>	<p>assert 14:1 asserted 56:6 asserting 40:21 assume 18:21 30:23 31:13 33:5 36:7 58:5,6 assuming 15:17 19:4 35:21 attached 12:12 17:4 attempt 43:13 attorney 3:3,10,17 4:9,16 august 7:13,14 austin 33:13 38:23 41:8 author 32:17 authored 32:14 automatic 48:10 avenue 3:4 avoided 47:19 aware 12:4 14:16 31:23 41:9 awareness 42:5</p> <tr> <td colspan="4">b</td></tr> <tr> <td colspan="4"> <p>b 1:23 17:4,8 back 13:16 59:6 61:8,9,11,12 backdrop 54:9 bad 50:18,20 55:9 balance 22:7 baltimore 48:8 bangladesh 54:21 bank 22:21 33:1 39:19 50:12 bankruptcy 1:1,16 1:25 17:12 20:21 21:8 22:13 23:22 26:23 29:9,19 31:6 33:18 40:5 46:1 47:4,16 49:20 50:1 50:2,4 54:11 56:15 63:24 bar 10:23 12:17 13:12 19:8 26:9,10 27:13,16,16 29:10 29:13,22 38:20 39:15 40:2,3,5,9,19</p> </td></tr>	b				<p>b 1:23 17:4,8 back 13:16 59:6 61:8,9,11,12 backdrop 54:9 bad 50:18,20 55:9 balance 22:7 baltimore 48:8 bangladesh 54:21 bank 22:21 33:1 39:19 50:12 bankruptcy 1:1,16 1:25 17:12 20:21 21:8 22:13 23:22 26:23 29:9,19 31:6 33:18 40:5 46:1 47:4,16 49:20 50:1 50:2,4 54:11 56:15 63:24 bar 10:23 12:17 13:12 19:8 26:9,10 27:13,16,16 29:10 29:13,22 38:20 39:15 40:2,3,5,9,19</p>			
b											
<p>b 1:23 17:4,8 back 13:16 59:6 61:8,9,11,12 backdrop 54:9 bad 50:18,20 55:9 balance 22:7 baltimore 48:8 bangladesh 54:21 bank 22:21 33:1 39:19 50:12 bankruptcy 1:1,16 1:25 17:12 20:21 21:8 22:13 23:22 26:23 29:9,19 31:6 33:18 40:5 46:1 47:4,16 49:20 50:1 50:2,4 54:11 56:15 63:24 bar 10:23 12:17 13:12 19:8 26:9,10 27:13,16,16 29:10 29:13,22 38:20 39:15 40:2,3,5,9,19</p>											

[bar - circumstances]

Page 3

41:6 42:2,4,8 43:5,7 43:8,18,20 44:24 46:20 50:3,25 51:1 54:6,7 57:3,5 58:4,6 62:12,13 barclay 58:20 barclays 52:23,25 53:1,1,2,2,7 54:6,10 54:14,17,20 55:4,5 55:17,18 56:10 58:2 58:10 60:11,19,21 61:9,13 based 16:2,2,12 27:3,14 35:19 46:7 56:9,25 60:4 62:20 63:22,25 basic 25:6 basis 38:21 40:9 49:22 57:6 62:21 battery 3:11 bear 36:24 beginning 65:4 begun 29:12 behalf 8:15 9:12 14:19 28:14 39:11 47:12 57:8 63:14 belabor 16:16 belief 56:8 57:1 believe 8:21 9:7 10:25 11:4 18:1 35:4,10 44:6 49:22 50:17 51:18,21 52:15 59:10 60:12 65:7,23 believed 56:19 61:19 benefits 19:17 best 21:12,14 beyond 44:16 63:20 bg&e 48:9,11 bgi 42:3 49:25 biggest 21:8 54:11 billed 64:22 biodiesel 47:21 bit 18:6 24:23 25:1 32:8	board 46:2,14 48:15 50:6 books 12:7,19 13:25 14:7,25 17:5,17 22:4 23:11 26:1 27:4,7 28:25 44:12 44:17 45:6,10 46:7 46:23 48:21 56:2 boston 4:18 63:9,11 bottom 25:23 33:8 36:1,9 bought 52:6 54:15 54:20 55:4 58:11 bounce 61:12 bounced 59:6 61:8 61:11 bouncing 61:9 bound 32:1 57:18 bowling 1:17 box 30:21 39:17,18 39:20,22,24 44:18 46:5,11 47:2,23 48:16 50:8,11,13,13 break 15:4 22:21 30:22 64:19 breen 48:8 brief 11:4 28:13 45:23 49:3 briefly 5:12 35:18 47:11 49:15 briefs 42:3 broker 20:5,11 21:11 44:17 46:7 50:21 broker's 53:16 brokerage 52:4 53:18 brokers 20:4 brothers 1:6,12 5:5 12:9 14:18,19 15:16 18:16 20:2 25:13,15 25:16,17 31:14 33:18 35:22,25 36:9 41:14 49:19,22 58:11 63:24 64:16 64:22,23,24	burn 50:4 burns 4:15 business 32:19 40:11 41:16 50:20 55:19 60:23 64:8,11 buying 54:17 55:18 bypass 63:16 c c 3:1,14 5:1 17:4,8 47:14 69:1,1 ca 4:9 39:11,14,21 39:23 40:3,3,8,11 40:16,18,24,25 42:1 43:4,8,18 44:24,25 45:25 46:20,22 47:15 48:22 49:5,12 49:18,19,22 50:8 64:3,9 67:16 ca's 39:13 40:10,20 40:21 46:3 calculated 28:5,9 calculation 34:1 calendar 10:6 call 16:25 called 25:21 27:12 53:7 calls 16:4 26:22 cambodia 54:22 capable 30:5 caputo 4:6 11:8 28:12,13,14 31:20 32:22 33:21 47:10 47:11,12 51:16,19 52:10,18 54:10 57:7 57:8,8 58:22 59:19 61:1 66:5 caputo's 44:5 50:16 careful 60:4 case 8:25 12:13 13:21 14:3,18 19:25 19:25 21:9,10 22:1 22:18 28:6,19 29:1 29:10,12,20 30:8,10 30:10,19 32:3 34:5 34:6,11,12,24 37:7 38:10,17,20 40:19 40:23 42:3,22 46:3	46:4,6,9,9,12,12,24 47:20,22 48:1,3,7,9 48:9,12,13,14,15,15 49:25 50:3,4,7,9 52:9,15,17,22 55:6 56:17,23 58:25 59:2 59:2,7,16 61:2,8 64:4 65:25 cases 14:17 29:8 30:13 33:21 40:16 40:17 42:5,6,9 43:15 47:20 60:1 62:1 category 55:15 cause 13:24 17:3 62:12 caused 40:16 central 33:1 century 30:9,10 certain 37:3 certainly 15:16 16:7 41:25 certified 69:9 certify 69:3 cet 69:9 chambers 8:13 chance 7:10 change 54:1 chapter 9:20 25:23 27:15 29:9 47:22 48:3 50:3 characteristics 11:19 50:23 characterization 19:24 44:5 characterized 41:7 51:17 chemtron 30:9 chicago 46:2,13 48:15 50:6 circuit 30:9,14 32:24 circulation 27:5 31:12 33:12 circumstance 32:21 circumstances 10:21 15:20 17:23
---	---	---	--

<p>18:1,3 23:19 26:25 28:5,10 35:9 47:6 52:17 59:6 cite 48:1 49:25 50:9 cited 30:8,11 42:3 citing 30:8 city 30:15 32:25 claim 5:16 6:13,17 9:1,3,18 10:22 13:18 14:12 16:13 17:6 22:20 23:24 34:4,16,22 36:22 39:3,4,13,15 40:10 40:16,17,18,20,21 40:24 49:2,23 52:17 52:20 53:12,12,14 53:15 56:4,25 57:2 59:1,1,14 64:3,10 65:25 66:7,9 claimant 11:22 13:17 14:14 19:2 25:3 27:20 31:4 34:8,17 39:7 46:15 50:11 55:8,9 57:25 58:8 claimant's 21:2 46:5 claimants 10:15 11:10,13,17 25:5,11 34:12 38:15,17 56:17 57:15,22 60:1 60:3 64:3 66:8 claiming 25:6 41:5 62:3,3 claims 2:2,5,5 5:7 6:12,13,16 7:11 8:2 9:8,15 10:7,8,12,14 10:17,19,25 11:2,5 11:6 14:1 15:14,14 16:20,20 24:14 25:8 27:1 29:22 30:11 36:23 45:12,13 46:7 47:7,8 49:19,21 58:16 67:6,10,11,15 67:16,19,20,23,24 class 15:11 16:1 18:24 24:16,21</p>	<p>clays 54:8 clear 29:24 33:1 35:4,10 clearing 59:3,4 clearly 23:8 29:16 41:8 45:25 49:6 client 13:5 19:11,18 19:22,23 20:19 42:7 42:13 43:14 44:19 44:21,23 51:4 53:10 54:7,8 63:24 clients 65:12 closed 39:20 47:2 50:13,13 clues 15:5,6 25:20 code 17:12 22:13 23:22 29:10 40:5 code's 20:22 coleman 56:14,21 58:25 59:3,7 61:2,8 collectingly 18:9 collins 4:13 39:8,10 39:10,18 41:12,20 41:22,25 42:19,24 43:11,17,20,22 44:1 44:24 45:19 49:15 49:17 51:10,14,25 colloquy 51:9 66:10 come 5:10 8:3 18:12 43:15 57:15 60:2 comes 20:7 coming 37:11 comment 11:13 30:2 57:10 commented 20:16 comments 28:13,16 35:19 60:14 commission 55:16 committed 55:21 companies 52:6 company 12:7 14:8 14:22,25 20:3 41:13 compelling 17:2 61:22 compiled 36:13 compiling 26:3</p>	<p>complete 42:18 completely 43:5 compliance 12:3 complied 31:4,10 48:18,19 58:7 comply 17:9 49:10 comprises 17:7 conceivably 62:1 concerning 14:7 40:19 62:17 conclude 15:22 19:13 33:10 concluded 8:14 60:4 61:21 63:25 66:15 concludes 9:20 conclusion 37:24 62:23 conduct 12:1,2 18:8 20:25 37:6 confused 41:11 49:18 congress 20:18 52:19 connection 40:13 consented 5:23 consequence 26:15 consequences 26:17 52:20 57:11 consider 62:16 considered 9:3 38:15 65:20 considering 59:25 consistent 30:13 44:11 constitutes 32:3 constitution 33:4 36:15 constitutionally 30:18 31:3 32:24 constructive 27:9 27:18 42:12 63:20 63:22 consumed 9:2 contacted 7:18 continuance 8:10</p>	<p>continue 10:17 continues 8:1 contract 34:13 64:13,14,17,20,25 65:2 contracted 41:2 contractual 25:9 contrary 64:6 controlling 48:11 convenience 12:13 convincing 52:10 cooper 3:22 11:21 11:21 12:21,24 13:13 15:3 16:6 18:5 19:19 20:3,9 21:17 24:2,6 35:18 37:10 copies 34:19 copy 9:17 37:10 corporate 64:16 corporation 4:1 28:15 47:13 57:9 correct 24:2 39:18 45:16 64:7 correctly 13:3 51:17 53:24 correspondence 39:25 41:13 counsel 7:18 8:17 9:13 10:20 11:24 28:25 29:3 31:4 35:19,20 47:15 48:9 48:14 58:24 62:22 counterparty 44:23 49:7 65:5 country 31:12 54:19,19,22 69:12 couple 19:4 25:2 61:25 course 26:11 58:13 64:23 court 1:1,16 5:2,14 6:9,11 7:8,11 8:6,18 9:3,24 10:3,16,19 10:20,25 11:6,8,12 12:9,20,22,25 15:2 15:4 18:2,4,6 19:12</p>
---	---	--	---

[court - discretion]

Page 5

20:2,6 21:3 22:24 24:1,3,11,16,24 26:5 27:15,17 28:11 28:22 30:8,15 31:5 31:18 32:7 33:5 34:7,14,19,21,25 35:2,3,9,11,13,15 36:16 37:9,13,15,18 39:9,17 41:3,15,21 41:24 42:6,20 43:7 43:10,12,19,21,23 44:10 45:18,20 46:1 46:14,18 47:1,3,5,6 47:9 48:17,22 49:14 49:16 50:15 51:12 51:16,21 52:1 53:4 53:14,18,21,24 54:3 54:23 55:1,22 56:11 56:15,23 57:4,15,20 58:25 59:18,20 61:1 61:15 62:6,10 63:1 63:3,6,8,10,12,16 64:19 65:13 66:1,3 66:6 court's 10:13,16 11:1,4,16 65:22 courtroom 8:12 courts 26:23 couth 38:1 credit 32:13 creditor 2:5 14:4,4 14:12,15 17:10 22:19 29:11 30:3,4 30:6,25 34:9 39:14 40:3 45:13,16 47:8 48:17 50:10 65:17 67:10,15,19,23 creditors 14:2 18:11 20:20 21:7 22:21 24:13 26:4,20 26:23 27:2,3 28:8 28:19,20,21 29:7 30:21 34:16 42:1,3 44:3,7,9 45:11 46:22 65:10 critical 62:5,7	critically 14:3 cross 18:11 23:17 crucial 55:16,21 60:22 curiosities 32:9 curiosity 19:1 curious 35:23 48:8 current 53:9 custodian 52:6 customary 14:9 customer 14:5,9,11 17:10 22:6 30:25 34:8,17 40:4 45:12 47:8 50:10 53:15,16 58:1,3,20 61:13 customers 14:1 21:8 24:13 26:4 27:2,3 28:7 39:21 39:23 45:11 cut 65:13 d d 5:1 36:7 67:1 69:9 d'souza 36:7,12 37:2,11 d.c. 4:4 daily 33:13 damocles 20:21 dash 22:17 date 7:20 9:6,8,14 10:23 12:17 13:12 13:12 16:22 19:9 25:10 26:9,10 27:13 27:14,16,16 29:10 29:13,22 38:20 39:15 40:2,5,9,19 41:6 42:2,4,8 43:5,7 43:8,18,20 44:25 46:20 50:3,25 51:1 54:6 57:3,5 58:4,6 62:12,13 69:15 dated 12:10 dawn 2:25 69:3 day 16:20 34:21 57:14 dead 42:11 deadline 40:9	deal 8:23 33:23 37:19 47:23 48:4,7 dealer 21:11 44:17 50:21 dealer's 46:7 dealing 21:7 41:6 41:10 44:20 57:25 65:17 deals 42:21 48:10 dealt 64:22 dear 54:7 debatable 62:13 deborah 2:2 5:7 67:6 debtor 1:13 14:4 48:17 49:1 51:6 64:7 debtors 1:8 3:3 13:25 17:5 45:10 decades 30:22 december 12:10,23 14:2 18:16 19:10 21:16 25:16 29:5 31:22 32:10 35:24 38:11 decent 11:18 decide 17:24 26:23 decided 34:13 decision 10:11,16 10:18 11:1 13:1 17:14 26:21 30:15 34:23 37:17,24 38:15 39:5,12 42:17 42:24 44:6,6 46:1 47:4 49:8 51:23 56:15 57:21,22 60:2 65:19 66:11 decisions 34:3 57:23,24 declaration 22:2 declarative 37:25 deficient 43:12,13 delete 49:21 delivery 46:19 demand 34:2 denied 34:22 49:13 57:16	dependent 13:15 deputy 8:12 described 62:20 designed 57:16 desirable 26:24 47:5 determination 10:11 determine 23:12 35:11,23 determined 18:14 34:19 41:1 51:5 determining 30:5 developer 40:11 41:7 dicta 48:11 dictates 44:6 difference 26:7 28:20 29:21 different 13:15 16:8 20:19 33:5 38:18 52:16,21 54:12 55:15,23 differs 29:6 difficult 33:22 34:3 38:22 42:22 58:22 59:13 diligence 14:23 16:15 18:10 65:11 diligent 13:6 19:11 30:7,20 dire 52:19 direct 42:25 directly 65:24 disagree 44:5 disallowance 39:13 disallowed 6:12 7:11 9:15 11:6 disallowing 6:11 10:12 40:10 discerned 49:6 discovery 18:8 19:15 23:14 26:14 26:18 27:6 28:23 38:3,5,6 62:18 discretion 38:1 52:13 60:6 61:25
---	--	--	--

[discuss - facts]

Page 6

<p>discuss 62:22 discussed 8:13 11:16 33:21 50:6 discussing 18:9 discussion 18:7 32:16 44:11 45:5 disposal 62:16 disposition 66:6 disregard 58:12 disregarded 58:16 distances 32:11 distinction 38:13 64:17 65:23 distinctions 45:2 distinguish 42:16 distinguished 65:16 distinguishes 11:15 64:5 distinguishing 11:19 19:14 50:23 district 1:2 34:6 46:2 47:21 48:2 56:16 document 17:20 49:7 documentation 8:19 58:1 documents 8:1 12:8 13:24 17:3 60:11 doing 21:5,11 38:21 42:23 63:6 64:8,11 doubt 22:20 draconian 20:16 23:5 drafting 65:3 draw 38:13 drexel 50:4 drill 45:2 drop 50:11 dropped 19:7 24:17 due 14:23 16:15 17:11,21 22:13 28:3 32:1 33:3 36:25 46:16 duty 44:16 57:18</p>	<p>e e 1:23,23 2:2 3:1,1 5:1,1 67:1,6 69:1 earlier 59:23 65:18 easily 27:12 29:22 eastern 48:2 ecf 2:2,5 5:17,20 6:8 6:14,25 7:3,7 67:6 67:11,16,20,24 echoing 28:16 effect 11:18 20:16 38:12 51:1 effort 35:13 efforts 30:7,20 eighth 2:4 67:9,14 67:18,22 eisenhower 3:18 either 8:17 9:12 14:21 31:15 54:5 58:15 electric 48:8 electronic 69:9 element 61:15 eleventh 35:12 elucidated 38:4 email 9:17 emergency 62:3 employed 15:17 employees 15:9 18:18 24:14 25:4 35:22 36:13 employer 15:17 ended 53:21,25 ends 22:11 engages 41:16 enormity 8:25 entails 50:2 enter 64:14 entered 6:11 13:22 enterprise 40:11 41:16 entirely 50:14 entities 40:22 entitled 17:10,22 33:20 40:4 42:1,4 43:18 44:3 45:16</p>	<p>entitlement 41:5 entity 41:1 45:3 64:7 epiq 24:14 epstein 4:23 52:3,3 53:5,16,20,23 54:2 54:5,25 55:3 56:1 58:8 59:17,20 60:14 61:7,24 62:8,25 67:20 equitable 42:13 48:22 51:3 61:22 equities 17:25 18:1 21:25 22:7,12,19,23 22:25 23:21 37:6 erin 36:7 error 26:13 58:13 errors 55:8,9,11,16 esep 25:3,6,7,10,11 34:11 36:5 especially 42:8 espoused 30:14 32:5,23 esq 3:7,14,22 4:13 4:20 essence 37:1 essentially 12:14 23:12,15 50:5 established 39:22 estate 26:12 29:13 34:1 et 1:7 evaluate 37:6 evaluation 60:4 evening 10:21 event 19:15 events 19:13 everybody 32:10 55:1,3 evidence 26:1 35:2 35:10 36:3 43:1 evidentiary 16:11 17:23 18:2 exact 16:11 59:11 examine 56:12 example 34:5 44:12</p>	<p>exception 38:2 41:5 42:14 48:23 62:19 62:21 exceptional 60:7 exceptions 37:20 57:3 excusable 19:5 20:22 21:1 23:23 32:3,4 37:22 48:3 55:9 excuse 19:14 41:21 41:22 58:7 63:10 65:21 excused 9:23,24 excuses 49:9 executive 15:9 18:17 25:4 exhibit 17:4 exist 33:23 existed 31:16 existence 38:10 explain 8:8,18 38:23 explanation 19:3 expressly 40:6 expunged 11:7 expunging 10:12 extent 14:13 17:9 43:16,17 extra 31:9 extraordinary 9:4</p> <p>f f 1:23 69:1 face 49:6 faced 34:7 facetious 22:22 fact 8:14 12:16 13:3 13:7 15:18,19 16:14 21:12 26:1,18 29:4 29:20 31:15 33:22 34:19 38:17 42:10 44:18 47:18 54:18 55:20 56:20 58:18 63:23 64:1,2,5 65:3 facts 15:19 17:14 19:14 21:19 32:19 35:1,2 46:4 56:13</p>
--	---	--	---

62:16 factual 10:21 11:4 27:6 failed 27:20 31:14 56:21,21 failing 19:6 26:8 fails 9:11 failure 19:11 49:9 57:2 fair 14:16 15:12 36:16 61:5 fairly 7:24 fairness 36:17 faith 58:18 falls 59:17 familiar 38:8 far 52:16 55:7 57:23 farrell 4:8 39:10 favor 17:25 18:2 49:19 february 5:18,19 feels 61:4,5 felt 57:21 fewer 49:5 fifth 3:4 figure 45:3 file 7:23 53:11 56:25 57:2 filed 2:2,5 5:7,15,19 6:4,7,23 7:1,6 10:7 10:19,20 12:14 13:1 16:20 30:11 34:10 40:17,18 52:20 53:12 55:12 56:4 64:3 67:6,10,15,19 67:23 filing 10:22 16:19 27:14 29:22 50:2 65:25 final 7:10 8:8,22,23 9:6,14 10:13 financial 20:8 53:2 financially 33:17 find 8:18 16:2 34:2 fine 14:21 17:1	firm 59:3,4 first 5:6,15,24 6:9 24:8 27:18 47:20 52:22 56:7 57:10 63:13 fit 57:2 five 6:12 7:21 9:1 flaw 64:9,9 florida 8:15 34:6 flourish 21:4 focht 2:2 5:8,16,19 6:4,19,23 7:6,9,17 7:20,21 8:1,7,14 9:11 67:6 focht's 6:7,12 7:2 7:14 focus 50:15 focused 18:17 focuses 32:10 follow 18:4 following 6:11 32:25 footnote 34:10 49:3 ford 48:1 foregoing 69:3 form 13:24 15:9 37:14 forms 17:3 30:16 forth 9:6 11:3 14:16 20:22 51:8 forward 12:16 23:24 found 20:18 22:16 27:16 28:19 30:10 34:21 38:21 46:14 48:18 56:23 59:13 four 7:23 10:8 31:11 34:19 49:5 fritz 4:8 39:10 front 45:1 full 30:20 function 65:3 fund 21:21 34:2 fundamentally 52:15 funds 55:14	further 6:1,19 7:4 7:15,18 9:11 12:15 12:16 32:8 33:5 35:11 49:17 futile 35:14 future 13:18 16:18 g g 5:1 garden 49:9 gas 48:8 general 2:5 14:2,15 15:13 19:21 27:5 28:18 31:11 33:12 39:14 47:7 50:10 67:10,15,19,23 generally 17:11 20:6 gentleman 17:10 22:8,18 36:14,18 getting 12:15 22:9 24:19 54:9 giddens 15:24 give 19:7 23:8,13 26:1 62:14 given 8:14 9:16 15:23 17:24 26:22 42:10,10,11 44:11 44:21 58:18 59:8 62:12 gives 29:18 giving 55:17,19 60:23 63:22 global 54:18 globally 54:19 go 14:17 16:13 23:24 33:16 41:4 54:21 goggling 54:16 going 12:15 16:21 16:25,25 21:9,10 22:21 23:6 31:18 38:18 51:7 53:8 61:18,20 good 5:2,3,4 10:4 11:21,23 28:14 32:17 39:8,9 52:3 57:14 58:18	gotshal 3:2 5:5 gotten 19:2 governing 14:6,7 government 34:7 governs 26:19 45:15 gragg 3:14 10:4,5 11:20 24:5,12,20,25 26:16 27:23 45:22 46:21 47:3 55:25 56:14 66:2 grant 38:1 60:7 granule 45:3 great 21:12 green 1:17 47:21 grounded 29:4 31:8 33:25 grounds 42:13 51:8 group 34:15,15 50:4 guess 24:7,22 27:25 52:7 guy 23:20 guys 23:16 h h 67:11 half 21:20 hand 12:8 36:3 hands 65:10,14 happen 62:1 happened 17:18,25 28:1 53:4 54:4,12 61:2 62:17 happy 36:3 harsh 39:2 57:22,23 hear 9:14 24:3 36:22 39:7 45:20 51:16 55:23 heard 10:12 44:15 45:5 52:8,10,16 55:7 60:1 63:15 hearing 2:1,4 5:9,17 5:24 6:2,9,11,15,21 7:4,8,12,14 8:7 9:6 9:7,8,18 10:8,10,13 10:21 11:5 12:1,2 16:11 17:23 18:2
--	---	--	---

21:18 35:13 44:13 51:9 56:8 57:14 62:23 65:18 66:11 hearings 7:21 held 6:9 10:9 14:10 42:8 49:8 60:17 hello 24:5 help 60:3 helpful 5:12 higher 34:8 history 5:12 9:9 21:9,11 holding 58:2 60:10 holdings 1:6 5:5 25:23 30:10 49:19 49:23 holds 44:8 hon 1:24 honor 5:4 9:19 10:4 10:10 11:10,24 12:5 12:17 13:22,22 14:13,16 16:6,10 20:18 21:19 22:7,24 23:3,4,6,13,15 24:5 26:16,21 28:13,16 32:6 36:2,20 41:23 47:11,14 49:8,15 51:19,25 55:25 63:2 63:4,7,13 66:2,5,14 honor's 10:18 12:4 19:24 20:15 23:3 hot 25:22 hour 35:12 how'd 23:17 hubbard 3:9 9:21 10:5 huge 26:12 hughes 3:9 9:21 10:5 huh 41:20 hunch 35:8 hypothetical 18:15 21:13 33:6 58:17 hypothetically 61:25 hypotheticals 34:24 35:16	i identified 13:25 17:5 24:13 27:8 30:7 46:6 49:1 51:5 65:4 identify 27:3 identifying 18:10 identity 32:19 ignores 47:16 illinois 46:2 informative 48:13 impact 42:16 imperiled 61:13 implications 47:24 48:5 important 33:25 importantly 13:21 46:12 50:12 inaccurate 65:23 inadvertently 11:25 19:7 inc.'s 45:25 include 26:8 included 33:10 39:5 includes 37:24 including 12:9 18:9 64:13 income 21:21,21 incommunicado 31:22 incorporate 26:20 incorporated 40:6 incorporates 28:3 incorrect 39:16 43:8 44:13 indicate 33:23 34:11 indicated 9:10 12:5 13:23 29:1 35:20 indicates 12:11,12 12:14 13:2 25:3 35:5 indication 13:11 25:14 indiscernible 12:15 20:10 36:9	individual 29:19 33:3 38:8,23 57:6 57:25 58:23 individually 16:2 individuals 18:25 24:16,21 30:23 59:8 industries 48:2 informal 62:18 informality 65:2 information 13:18 29:6,7 53:3 55:17 55:20 58:19,23 60:21,23 62:8 63:25 65:24 informative 15:6 initial 29:13 injustice 38:21 inquiry 13:5 29:25 31:25 35:5,6,12 37:12 41:19 63:22 63:25 instance 62:19 instances 49:6 instructed 39:21 insufficient 44:2 intent 52:19 intentionally 37:4 interested 28:5,10 interests 13:7 16:1 27:21 32:2 interject 12:22 international 64:23 67:25 interpret 54:14 interpretation 51:22 52:21 interpretations 52:19 interpreted 51:23 interrupt 24:22 investigated 40:25 investor 4:1 28:15 29:17 31:8 47:12 57:9 investors 34:3 57:17	invoices 39:23 involve 42:7 involved 43:7 50:10 involves 47:22 48:3 50:10 irrelevancy 37:23 issuance 10:18 60:1 issue 36:24 45:15 issued 10:10 issues 20:1 37:17,19 i'd 28:17 j j 4:6 james 1:24 january 5:11,16 jeffrey 3:22 11:21 jmp 1:5,11 job 21:12 22:10 jointly 1:6 62:19 journal 34:20 judge 1:25 11:21 13:14 17:2,13,15 19:19 21:17 22:23 23:25 24:2 35:18 37:8 judgment 22:25 judicial 9:2 35:3 54:24 july 7:5,6,8 11:16 13:1 19:13 26:22 37:17 39:6,12 42:16 42:19,24 43:7 47:4 49:8 51:8 52:12 60:2 61:24 65:19 66:11 june 6:17,21,21,23 7:1,4 10:9,12,19 52:8 57:14 jurisprudence 14:15 17:11 23:22 k keep 45:22 kelly 56:17 kellys 56:24 59:1,13 kenneth 4:6 28:14 47:11 57:8
---	---	--	--

[key - mandatory]

Page 9

key 47:14 kind 8:4 13:9 21:8 26:13 kinds 15:23 20:1 knew 55:3 63:23 know 13:3,14 14:16 14:17,20,21 15:5,17 15:18,19 16:7,9,21 19:22 20:13,24 21:6 21:25 22:3,6,9,11 22:14 23:1,1,2,10 23:16,19 24:8,11 25:19,24 28:1 31:13 34:24 36:2,12,15,17 36:21,22 37:1,4,5 38:25 41:10,17 42:5 44:19 49:18 54:5 59:12,20 64:10,20 knowledge 24:20 known 15:17 28:20 30:3,4 39:14 41:3 44:3,6,8 46:22 54:11 knows 55:1	lbhi's 40:25 lbi 2:5 9:22 12:14 15:25 21:10,10 25:11 39:14 40:12 40:19 41:2,4,11 44:19,20,24 49:1,7 64:1,6 65:8,9,24 67:11,16,20,24 lbi's 26:1 44:11 45:6 46:23 56:2 lead 15:22 19:16,17 leading 40:11 41:7 leave 37:4 led 17:20 55:21 60:1 legacy 24:13 35:22 36:12 legal 26:6 51:17 65:15 legitimate 58:20 legitimately 38:13 38:24 lehman 1:6,12 5:5 8:25 12:9 14:18,19 15:16 18:16 20:2 21:24 24:13 25:13 25:15,15,17 30:22 30:25 31:14 33:18 35:22,25 36:9 40:22 41:1,14 42:5 49:19 49:22 52:4 53:10,11 54:10,15,18,20 55:4 55:19 58:11 60:22 63:23 64:16,22,23 64:24 letter 10:20 12:9,11 12:14,23 13:2,4,4,8 13:9,17,20,20 14:20 14:22,24 15:5,7,8 15:10,12,21 16:4 17:7,16,19 23:2 24:22,24,25 25:2,3 25:12 27:11,13 29:5 29:15 32:10,12,12 32:13,17,18,18 35:24,25 36:14 42:11	letterhead 64:24 letters 52:25 54:6 54:10 55:12 level 45:3 levinson 4:15 63:4 liable 40:21 licensed 40:12 licenses 40:12,14 life 31:16 62:1 likes 33:16 limit 31:25 37:21 61:8 limitations 48:6 49:10 limited 18:19 limits 47:25 48:23 line 25:22 67:4 liquidation 15:25 21:10,11 25:17 26:10 29:17,20 30:1 31:23 34:1 35:7 list 18:13,18,22 19:7 24:12,17 26:3 30:20 30:25 33:10 36:13 43:14 62:4 listed 5:17,20 6:8,14 6:25 7:3,7 25:23 lists 18:12 19:6 35:23 litigated 48:14 59:2 little 18:6 24:23,25 32:8 52:12 lived 34:18 lives 8:14 20:11 33:14 living 38:23 41:8 54:12 livingston 3:20 llp 3:2 4:15 local 20:11 22:10 located 63:9 lock 39:17,18,20,22 39:24 44:18 46:5,11 47:2,23 48:16 50:8 50:11,13,13 long 31:15 50:20 60:15 61:11	look 14:6,10,15 17:19,19 22:5,6 23:16,17,19 25:20 44:16 62:15 looked 22:5 35:22 54:19,19 63:24 65:20 looking 11:18 64:14 64:19 looks 36:8 lose 50:22 lost 22:19 lot 16:24 57:5 lots 52:25 lubetkin 11:22 lubettin 3:16 lulled 58:8
m			
l 31:6 47:16 l.l.c. 3:16 laird 56:17 lambert 50:4 language 64:17,20 largest 21:10 late 2:5 10:7,19 30:11 52:20 53:12 53:12 56:4 57:17 59:15 61:12 67:10 67:15,19,23 law 28:19 35:14 42:22 57:18,18,19 60:5 62:20 lawyer 16:7 lay 10:24 lays 45:24 lb 64:12 lbhi 21:9 40:15,17 40:20,23 41:2,13 49:1 51:6 64:2,4,7	m 1:24 4:20 ma 4:18 magnitude 28:6 mail 26:22 44:4,7 46:10,15 48:19 50:11 mailed 13:25 24:10 28:7 34:20 43:2 46:11,21,22,25 56:1 56:18 mailing 9:17 26:9 29:13 30:16 43:8,22 44:1 48:11,16 56:1 56:3 59:11 mailings 45:9 mainstream 31:17 maintained 30:25 39:19 44:19 50:11 50:12 maintenance 40:13 making 21:4 32:13 51:2,3 65:14 maleen 32:25 44:5,6 man 21:20 22:12 managed 21:23 managing 26:12 mandatory 10:22 57:3		

[manges - okay]

Page 10

manges 3:2 5:5 manifest 38:21 march 5:25 6:1,4 36:6,14 mart 22:10 33:15 41:9 massive 23:14 master 18:13 matter 5:6 7:20 8:5 8:24 14:3 28:25 29:2 34:19 35:14 36:21 38:8 41:19 45:6,7 47:1 50:17 50:23 53:13 56:12 62:24 matters 20:8 52:13 64:21 meaghan 3:14 10:4 mean 17:8 22:6 23:15 24:7 36:16,25 39:12 61:12,16 medical 62:2 meet 22:11 34:25 35:1 meld 19:6 mellon 39:19 member 15:10 memorandum 10:10 mennonite 30:8 mentioned 19:20 merit 8:2 message 13:9,14 messages 58:15 met 28:2 39:1 middle 15:6 mineola 69:14 misconduct 26:11 misleading 15:6 58:19,24 misled 62:11 missed 24:18,21 26:2 28:23 misspoke 24:4 misstated 11:25 mistake 26:13,14 33:7 37:5,5 49:2	55:6,17,21 60:18,23 62:5,7 mistakenly 48:25 51:5 mixed 13:9,14 mixing 58:14 moment 12:22 19:2 58:5 monday 10:20 monello 38:18 money 16:24 21:22 21:23 monitor 61:18 month 10:23 57:3 months 29:23 37:21 morning 5:2,3,4 10:4 11:21,23 28:14 39:8,9 52:3 motion 7:6 49:12 motions 34:11 move 62:24 moved 50:14 53:8 56:7 59:5 moving 45:14 63:20 mysterious 27:10	never 32:18 38:24 38:24,25 56:9 57:14 nevertheless 34:17 48:18 new 1:2,18,18 3:5 3:12 30:9,10,15 32:25 39:22 50:14 54:17 56:16 59:4 60:15 news 54:18 newspaper 33:13 55:13 newspapers 27:5,10 31:11 33:12 38:25 night 35:12 nj 3:20 non 10:13 30:17 northern 46:1 47:21 notable 48:24 noted 12:17 37:17 notice 9:16 12:3,6 12:15,16 13:5,10 14:16,23 15:13,23 15:24 16:19 17:2,7 18:15,23,25 19:2,10 20:17 21:13,15,15 22:3 23:8 24:9,10 24:19 26:9,19,22 27:4,8,9,9,18 28:7 29:11,19,23,25 30:17 31:3,7,11,25 32:14,20,21 33:2,3 33:11,11,19,20 34:4 34:18,21,22 35:3,5 35:6 37:19 38:9,24 39:1,15 40:2,4,8,19 42:2,4,8,9,12 43:2,3 43:5,8,13,13,18 44:3,7,7,11,21,25 45:15,16 46:5,10,11 46:13,15,15,19,20 46:22,22,25 47:1,5 47:17,22,24 48:5,17 48:18,20,21 50:1,2 50:7,18,18,23,25 54:24 56:1,6,18	58:4,6,15,16 59:5,8 62:13 63:16,18,20 63:22,22 64:6 65:12 notices 40:15 44:25 notification 28:18 notifying 26:23 notion 45:8 number 5:17,21 6:8 6:14,25 7:3,8 13:7 25:5,20,21,21,22 27:13 34:10 41:16 42:6 52:18 53:2 numbers 6:13,17 numerous 25:5,11 ny 3:5,12 4:11 69:14
o			
o 1:23 5:1 36:8 69:1 objected 40:20 objection 2:1,4 5:7 5:10,13,16,18,20 6:2,5,10,16,24 7:13 7:15,22 9:2,3 10:7 39:3 40:25 49:12 56:6 59:11 66:9 67:5,9,14,18,22 objections 25:8 obligation 48:19 obligations 56:25 obligor 49:18,23 observer 15:22 obvious 60:9 obviously 13:19 23:10 36:24 60:11 occurred 9:9 24:11 47:18 61:3 october 9:7 offered 52:18 office 42:11 oh 21:3 41:24,24 okay 11:12,20 23:7 28:11 43:10,11,19 45:18,19 47:9 50:15 51:14,21 52:1 54:3 54:25 55:22 57:4 59:18 63:12 66:6			

<p>old 69:12</p> <p>omission 55:11</p> <p>omnibus 2:1,4 5:7 5:17 6:5,10,16,24 7:15 9:8 10:7 12:25 25:8 67:5,9,14,18 67:22</p> <p>onerous 37:20</p> <p>ones 24:18 40:23</p> <p>opinion 11:4,16 12:4,5,17 19:12 20:15 30:11 51:9 52:12 61:24</p> <p>opportunity 7:23 8:8,22,23 24:18 59:14 62:15,22</p> <p>opposed 64:7</p> <p>opposite 61:5</p> <p>order 6:11,14,15 9:5,6,16 10:13 12:3 13:22 17:2 18:12 23:4,4 27:1 43:7 47:5,7</p> <p>ordered 27:2</p> <p>orderly 34:1</p> <p>ordinarily 26:22</p> <p>ordinary 26:11,21 29:9,19</p> <p>originally 5:18</p> <p>ought 23:1 36:18 37:1,5 52:17</p> <p>outcome 19:17 38:22</p> <p>outcomes 34:3</p> <p>outset 57:13</p> <p>overcome 42:23 65:7</p> <p>overridden 38:20</p> <p>override 61:23 62:12</p> <p>owed 16:24</p> <p>ownership 14:10</p>	<p>paper 58:12 60:10</p> <p>papers 10:24 12:12 12:13,25 42:18 43:23 47:14 49:2,24 49:25 56:5 61:17 65:21</p> <p>paperwork 62:15 64:12</p> <p>paragraph 15:7 16:17 48:25 51:5</p> <p>park 3:11</p> <p>parkway 3:18</p> <p>part 19:5 26:7 27:19 33:17 37:18 62:5,7 64:21 65:7</p> <p>participants 18:19</p> <p>participated 30:24</p> <p>participation 25:6</p> <p>particular 11:14 15:8,15 28:2 31:23 31:24 34:5,21 35:7 45:25 56:12 58:8 62:16</p> <p>particularly 18:17 30:16 48:13</p> <p>particulars 52:22</p> <p>parties 22:24 28:6 28:10 42:7 43:6 63:21 64:13</p> <p>partnership 46:2,14 48:15 50:6</p> <p>parts 27:17</p> <p>party 40:21 41:6 50:12 58:22 60:18 65:9</p> <p>passing 12:5</p> <p>passive 16:5</p> <p>patently 43:8</p> <p>patrick 4:13 39:10</p> <p>pattern 31:15</p> <p>patterns 33:22</p> <p>pause 10:2</p> <p>paying 22:21</p> <p>payments 22:9 39:20,21,24</p> <p>peck 1:24</p>	<p>peculiar 59:6</p> <p>pejorative 19:23</p> <p>pending 5:11 9:1</p> <p>pennsylvania 39:19 48:2</p> <p>people 18:9,22 20:6 33:16,17 37:2 52:8 63:23</p> <p>period 8:5 54:18 61:11</p> <p>permits 36:16</p> <p>permitted 59:14</p> <p>person 9:12 16:21 22:4 23:17 37:2</p> <p>personally 8:17</p> <p>persons 13:25 17:4</p> <p>perspective 13:10</p> <p>peru 34:18,20</p> <p>ph 30:14 33:1 48:8 50:4 56:15</p> <p>philadelphia 39:22</p> <p>phone 13:7 25:20 25:21,21,22 63:5</p> <p>piece 58:12</p> <p>pieces 60:10</p> <p>pioneer 20:22 32:5</p> <p>pittsburgh 39:19</p> <p>place 8:7 18:11</p> <p>placed 38:9</p> <p>plan 2:1 5:6,10,15 5:20,23 6:1,5,6,9,20 6:24 7:1,7,9,12,15 7:18,22,25 8:3 15:9 18:18,19 25:5,10 67:5</p> <p>planet 31:19,21 54:13</p> <p>plans 25:7</p> <p>plausible 7:10</p> <p>plaza 3:11 4:10</p> <p>please 5:2 10:3</p> <p>podium 9:21</p> <p>point 16:6,16,18 31:2 47:14 49:2</p> <p>pointed 64:9</p> <p>points 24:6 25:2 28:17 52:14</p>	<p>policy 33:23 47:24 48:5 60:5</p> <p>poor 22:18</p> <p>portion 9:20,22</p> <p>posed 28:22 34:25</p> <p>position 8:9,18 10:24 26:16 28:8 32:20,22 45:25 51:17 64:12 65:22</p> <p>possibly 22:16 23:10 41:11 56:6</p> <p>posting 30:17</p> <p>potential 14:4 24:12 26:3 27:3 28:7</p> <p>potentially 14:1 17:6 25:4 34:15 38:22 58:23</p> <p>practical 37:22 38:6</p> <p>prepared 9:5 13:4 15:8 18:16 64:25</p> <p>present 4:22 11:8</p> <p>presented 65:9</p> <p>presently 10:15</p> <p>president 64:15</p> <p>press 54:15</p> <p>presumably 13:19 55:13</p> <p>presume 14:8</p> <p>presumption 43:1,4</p> <p>pretty 20:7</p> <p>prevail 51:7</p> <p>previously 63:15</p> <p>prior 14:11 20:3,4</p> <p>probably 11:24</p> <p>probative 18:23</p> <p>probe 32:7</p> <p>problem 42:22 58:9 64:21</p> <p>procedural 5:12 36:25</p> <p>procedures 16:19 20:17</p> <p>proceed 9:13 10:3 11:18</p> <p>proceeding 15:14 19:10 25:11 27:15 28:6 29:20 30:1</p>
<p>p</p>			
<p>p 3:1,1 5:1</p> <p>p.c. 4:8</p> <p>page 33:8,8,9 36:9 49:3 64:14 67:4</p>			

<p>31:23 32:5 35:6,7 56:18,25 proceedings 66:15 69:4 process 17:11,21 22:13 27:1 28:3 33:3 36:25 46:16 47:7 produced 42:25 produces 19:16 professionals 26:3 proffer 35:21 proffered 63:15 prompt 34:1 proof 39:15 40:16 40:16,17 49:1 65:3 proper 48:16 50:24 51:22 58:6 properly 43:2 proposition 50:7 62:13 prosecute 10:17 protect 13:6 16:3 27:21 32:1,15 protecting 16:1 protection 4:1 28:15 29:18 31:8 47:12 57:9,16,17 protocols 23:18 proved 18:24 proves 26:14 provide 7:10 9:7,10 19:14 33:2 provided 24:14 39:25 40:13 66:10 provides 15:5 31:6 47:16 58:23 provisions 25:9 51:22 publication 26:24 27:9 30:17 31:7 32:21 33:2 40:2 44:2,4,8,9 46:13,16 47:5,17,24 48:5 50:19 publish 27:4</p>	<p>published 33:13 48:21 publishing 16:19 31:11 purpose 5:9 39:20 purposes 37:22 38:6 41:19 50:24 pursuant 59:4 pursue 59:14 pursued 65:10 pushing 6:21 put 13:5 15:12 21:22 32:14 36:3</p> <tr> <th colspan="2">q</th></tr> <tr> <td>qualify 19:22</td><td></td></tr> <tr> <td>question 13:4 16:11 16:14 20:25 28:22 35:17 38:9,19 41:18 43:25 49:17 58:5 62:22</td><td></td></tr> <tr> <td>questions 11:10 16:10 18:8 19:4 23:15</td><td></td></tr> <tr> <td>quickly 63:16,25</td><td></td></tr> <tr> <td>quite 9:4 29:16 37:20 51:19 61:5 63:17</td><td></td></tr> <tr> <td>quote 29:17 48:25 62:1</td><td></td></tr> <tr> <th colspan="2">r</th></tr> <tr> <td>r 1:23 3:1 5:1 69:1</td><td></td></tr> <tr> <td>rabinowitz 3:16 11:22</td><td></td></tr> <tr> <td>rate 47:18</td><td></td></tr> <tr> <td>read 16:7 33:12 38:25 42:18 52:10 52:11 59:23</td><td></td></tr> <tr> <td>reader 15:7</td><td></td></tr> <tr> <td>readily 29:10,12 30:24 49:4</td><td></td></tr> <tr> <td>reading 15:12,21</td><td></td></tr> <tr> <td>reads 33:12</td><td></td></tr> <tr> <td>reality 42:21</td><td></td></tr> <tr> <td>realize 19:21 37:11</td><td></td></tr> <tr> <td>realized 53:6</td><td></td></tr>	q		qualify 19:22		question 13:4 16:11 16:14 20:25 28:22 35:17 38:9,19 41:18 43:25 49:17 58:5 62:22		questions 11:10 16:10 18:8 19:4 23:15		quickly 63:16,25		quite 9:4 29:16 37:20 51:19 61:5 63:17		quote 29:17 48:25 62:1		r		r 1:23 3:1 5:1 69:1		rabinowitz 3:16 11:22		rate 47:18		read 16:7 33:12 38:25 42:18 52:10 52:11 59:23		reader 15:7		readily 29:10,12 30:24 49:4		reading 15:12,21		reads 33:12		reality 42:21		realize 19:21 37:11		realized 53:6	
q																																							
qualify 19:22																																							
question 13:4 16:11 16:14 20:25 28:22 35:17 38:9,19 41:18 43:25 49:17 58:5 62:22																																							
questions 11:10 16:10 18:8 19:4 23:15																																							
quickly 63:16,25																																							
quite 9:4 29:16 37:20 51:19 61:5 63:17																																							
quote 29:17 48:25 62:1																																							
r																																							
r 1:23 3:1 5:1 69:1																																							
rabinowitz 3:16 11:22																																							
rate 47:18																																							
read 16:7 33:12 38:25 42:18 52:10 52:11 59:23																																							
reader 15:7																																							
readily 29:10,12 30:24 49:4																																							
reading 15:12,21																																							
reads 33:12																																							
reality 42:21																																							
realize 19:21 37:11																																							
realized 53:6																																							

 really 8:22 9:4 20:15 21:12 22:20 26:12 27:17 31:25 44:20 58:9 **reason** 38:13 50:8 60:11 **reasonable** 16:21 **reasonably** 19:13 28:4,9 30:6,7,20 **reasons** 11:3 29:3 35:16 39:4,5 48:19 66:10 **rebut** 43:1 **recall** 8:6 13:3 **receipt** 30:18 40:25 46:24,25 48:16 50:24 **receive** 13:18 24:9 27:8 29:7,11 33:11 40:4,8,19 42:7 44:7 45:16 46:10 56:6 63:18 **received** 8:12 29:5,7 29:15 33:11 35:6 36:5 44:24 46:15 53:6 58:4 59:5 63:21 64:1,2,6 **receives** 43:2 **receiving** 27:10 31:3 39:20 40:15 **recitation** 42:18 **recite** 9:8 **recognized** 14:13 26:21 47:4 **recognizes** 14:14 **recognizing** 8:25 **record** 9:10 14:22 16:13 20:10 23:9 39:5 53:10 69:4 **records** 12:7,19 14:1,7,9,10,25 17:5 17:17 22:4 23:11 26:2 27:4,7 28:25 32:20 33:6 41:1 44:12,17 45:7,10 46:8,24 48:21 50:20 56:2 | **reed** 10:5 **reference** 12:22 13:8 15:8 16:17 23:17 35:25 45:12 45:13 **referencing** 18:11 57:21 **referred** 48:9,14 **referring** 56:10 **refers** 30:10 **reflects** 14:24 **regard** 11:16 13:23 14:11,12,14 29:25 30:3 45:4 **regarding** 11:5 40:15 45:5 **regardless** 27:19 28:1 38:6 46:14 **regrettable** 39:2 59:24 **regrettably** 60:7 **related** 6:16 **relates** 9:18 **relationship** 15:15 **relatively** 8:4 **relevant** 22:1 **relied** 23:4 **relief** 19:8 38:2 48:22 60:7 **rely** 47:20 **remaining** 6:16 7:11 8:2 9:14 **remedies** 29:25 **remember** 53:24 **remitting** 39:24 **removed** 31:16 **repeatedly** 8:16 **repercussions** 57:6 **reply** 6:7,8 7:2,7 11:3 12:25 45:24 49:15 60:14 **reporter** 50:1,5 **representative** 12:6 12:18 17:16 22:5 **request** 6:19 7:14 7:18 11:25 12:2 38:3 |

[requested - sought]

Page 13

<p>requested 5:21 35:12 requests 8:10 required 23:5 46:25 requirement 50:25 65:16 requirements 26:19 28:2 33:4 37:19 46:17 requires 17:3 22:13 28:4 46:19,21 requiring 12:3 rescue 44:2 resolve 5:10 resolved 8:5 respect 11:1 15:14 15:24 16:1 28:1 37:20 42:15 43:24 45:15 51:7 respectfully 49:11 respond 5:22 11:9 51:10 respondents 38:2 42:25 response 5:19 6:5 6:19,24 7:2,22 16:8 20:14 21:2 24:6 45:5,22 48:24 49:25 56:5 responses 6:7 7:23 responsible 40:23 60:18,19 result 30:13 46:11 58:6 59:13,16,17 61:3 resulted 62:11 65:18,24 retired 15:18,19 22:8 retirement 21:21 revert 38:7 review 5:12 reviewed 7:25 14:23 17:17 rhetorical 21:4 right 19:8 21:3 27:22,23,24 65:13</p>	<p>rights 16:3 29:25 32:15 35:8 38:10 rise 63:22 risk 30:17 52:5 river 47:21 road 69:12 rubric 21:1 rule 14:14 31:5 36:20 37:21 47:16 ruled 51:13 rules 14:6,7 31:6 40:6 ruling 21:19 rulings 67:3 running 8:16 rxr 4:10</p> <tr> <td>s</td><td rowspan="2"> <p>s 3:1 5:1 36:8 safe 58:11 safeguard 33:2 sake 18:7,14,20,21 21:6 26:5 32:16 44:10 samaritan 32:17 satisfy 33:3 saw 12:6 54:14 saying 16:13 22:2 22:23 24:8 50:16,17 52:25 54:7,20 55:11 56:1 says 17:16 30:15 41:13 42:2,3,24 50:1,5 52:12 64:15 schedule 8:4 scheduled 5:18 49:19 schedules 49:20,21 seated 5:2 second 6:23 7:2 16:24 21:18 27:19 30:14 31:2 32:24 48:1 secure 60:12 securities 4:1 28:15 29:17 31:8 34:7 47:12 53:19 57:9</p> </td></tr> <tr> <td></td></tr>	s	<p>s 3:1 5:1 36:8 safe 58:11 safeguard 33:2 sake 18:7,14,20,21 21:6 26:5 32:16 44:10 samaritan 32:17 satisfy 33:3 saw 12:6 54:14 saying 16:13 22:2 22:23 24:8 50:16,17 52:25 54:7,20 55:11 56:1 says 17:16 30:15 41:13 42:2,3,24 50:1,5 52:12 64:15 schedule 8:4 scheduled 5:18 49:19 schedules 49:20,21 seated 5:2 second 6:23 7:2 16:24 21:18 27:19 30:14 31:2 32:24 48:1 secure 60:12 securities 4:1 28:15 29:17 31:8 34:7 47:12 53:19 57:9</p>	
s	<p>s 3:1 5:1 36:8 safe 58:11 safeguard 33:2 sake 18:7,14,20,21 21:6 26:5 32:16 44:10 samaritan 32:17 satisfy 33:3 saw 12:6 54:14 saying 16:13 22:2 22:23 24:8 50:16,17 52:25 54:7,20 55:11 56:1 says 17:16 30:15 41:13 42:2,3,24 50:1,5 52:12 64:15 schedule 8:4 scheduled 5:18 49:19 schedules 49:20,21 seated 5:2 second 6:23 7:2 16:24 21:18 27:19 30:14 31:2 32:24 48:1 secure 60:12 securities 4:1 28:15 29:17 31:8 34:7 47:12 53:19 57:9</p>			

see 22:1,24 35:1
37:6 60:10 62:17,21
65:21
seeking 10:21 25:8
48:22
seen 56:9
select 15:9 18:18
selective 25:4
self 8:19
selling 60:24
send 14:23 39:21
43:13 45:9
sending 16:19
sense 17:15,18 58:9
sent 12:10 13:4
14:21 25:14,15,18
25:18,19,24 26:9
32:18 39:15,23 40:1
43:5,9 46:5 47:2,22
50:7,18 54:6 55:12
58:12 59:9
sentence 37:24
45:11,12 59:23
separate 7:23 9:17
september 1:20
7:17 69:15
serious 62:2
service 13:23
services 40:13
41:18
set 11:3 29:14,23
42:17 49:23 51:8
sets 9:6 27:16
shares 52:4,6
shearson 20:5 21:23
21:23 30:22
short 8:4
shortly 6:6
shot 23:13
shown 27:20 45:10
shuffle 22:19
sic 18:10
signed 22:2 36:6
37:12 64:15
similar 36:8 46:4
61:2 63:17

similarly 11:17 66:7
simple 38:12
simply 15:20 17:8
41:13 57:17 64:15
single 9:1
sipa 1:11 3:10 10:5
15:14,25 17:22
19:10 20:17 24:4,4
25:22,22 26:10,19
27:13 28:2 29:18,21
32:4 33:24 34:18
35:7 37:20 38:10,20
40:6 42:9 45:8
46:16 47:25 48:6
49:8 50:8 51:1,22
56:18 57:5 60:5
sipa's 57:3
sipc 11:8,9 24:4
38:7 45:21 57:14
66:3
sit 16:25 51:13
situated 11:17 66:7
situation 11:14,14
20:19 22:20 34:7
38:14 42:9 62:17
65:8,16
six 10:22 29:23
37:21 57:3
size 22:18
skeptical 41:19
small 53:21,22
software 40:12,12
41:7,17
somebody 13:19
14:24 33:7 60:24
somewhat 34:9
sophisticated 19:11
19:23,25 20:7 23:18
33:17 41:6,17 42:12
64:13
sorry 13:13 14:12
15:3 21:12 23:19
26:12 36:17 60:9,13
sort 18:13 24:17,22
26:15
sought 38:2

[south - three]

Page 14

<p>south 2:25 69:3 southern 1:2 34:6 56:15,16 speak 20:21 speaking 20:6 special 42:14 specialized 29:21 specific 23:5 29:6 59:1 specifically 13:2 17:2 20:15,24 21:20 22:2 31:5 specificity 65:5 specifies 29:16 spent 59:25 spring 48:1 standard 20:14 28:18 29:8 30:25 33:1 34:8 38:20 standards 19:12 32:5,23 33:23 39:1 standing 41:5 start 24:8 55:25 started 53:21,25 stated 29:3,4 39:4 51:4 58:24 65:23 statement 9:4 12:18 36:5 53:6 56:4 statements 56:10 states 1:1 stationery 12:9 18:16 25:13 58:20 statute 29:21 31:24 34:22 40:7 45:8 57:12,16 60:6 61:23 statutory 33:24 stay 48:10 step 13:16 31:9 stephen 3:17 11:22 67:11 steps 32:1,1 stock 14:9 street 4:2,17 20:7 20:12 34:20 stress 28:17 strict 31:24 34:23 37:21 38:19 47:25</p>	<p>48:6,23 49:10 57:11 57:19 59:16 65:15 strictly 17:9 58:7 strike 7:6 struggled 60:2 stuck 23:20,21 sub 31:6 47:16 subject 36:23 38:16 40:23 51:24 submission 35:5 submissions 8:19 submit 37:13 49:11 submits 42:1 submitted 8:1 12:8 25:7 49:5 56:4 59:10 subordinate 25:9 subordinated 34:12 34:15 subordination 36:23 subsection 33:24 subsequent 13:20 16:17 22:25 substantial 42:25 substantially 46:4 66:10 subtext 55:10 successfully 56:21 sudden 61:10 suffice 61:21,22 sufficient 23:23 26:24 31:20 33:2 40:3 44:15 46:16 50:8 62:12 suggest 9:5 16:9 62:19 suggesting 21:5 23:13 suggests 15:7 suite 3:19 4:3 69:13 summer 4:17 8:7 59:25 supplement 44:4 supplemental 31:7 47:17</p>	<p>supplemented 30:16 50:19 support 50:7 supposed 39:25 56:20 58:21 supreme 30:8 sure 12:21 14:19 18:5 26:6 49:16 57:5 62:6 surrounding 10:22 susan 56:17 suspect 44:13 sustained 39:3 66:9 sustaining 8:20 sword 20:21 system 36:25</p> <p>t</p> <p>t 4:13 69:1,1 take 13:6,16 19:11 27:21 28:4,8 32:1 32:12 35:3 38:3,11 54:24 55:14 62:15 taken 18:11 26:14 30:4 34:10 65:12 tal 4:20 63:4 talk 23:16 24:24,25 29:8 33:18,18 53:10 61:20 talked 37:3 53:11 55:16 talking 14:8 15:20 19:21 23:14 33:24 35:24 36:24 talks 55:7 tame 56:7 telephone 63:6,14 telephonic 4:20 tell 61:4 tens 21:7 term 19:24 terms 14:15,18 19:8 19:22 22:21 terrible 33:7 test 34:25 texas 20:11 33:13 38:23 41:8</p>	<p>th 56:4 thank 9:19,24 10:1 11:20 23:25 28:11 32:6 37:9,15 47:9 49:14 51:20,25 52:1 59:18,19 62:25 66:14 thanks 37:8 theme 38:8 thing 25:12 31:7 36:22 50:5 things 18:13 19:20 23:5,6,7,8 33:19 35:21 36:11 38:4 52:21 57:4 62:4 think 5:11 11:12 16:7 17:21 19:19 20:1,4,5,9,10,11,16 21:14 22:1,12,25 24:4 26:18 27:23 30:21 32:23 34:9 35:20 36:15 41:22 41:23,25 45:7,14,24 47:14 48:24 50:9,16 51:1 52:24 56:11,20 57:23 59:9 62:14,21 62:23 third 30:9 48:7 50:12 58:22 60:18 thomas 3:17 10:20 11:5,22 12:1,5,8,10 12:11,16 13:19 14:3 14:13,25 15:13 17:22 18:15,22 19:1 21:13 24:9 25:3 26:1,8 27:7 28:1,24 29:4,15,24 30:3 31:21 32:11,14,18 33:6 34:14 35:4 36:5 38:3,14 45:5 63:17,18 67:12 thought 22:8 31:18 52:5,23 54:7 55:4 thousands 21:7 threatening 62:2 three 6:12,12 7:21 27:4 47:20</p>
---	---	--	---

[time - went]

Page 15

<p>time 5:21 6:21 8:5 8:16 9:2 13:23 22:9 25:16 31:24 36:4 37:13,21 38:5 41:8 43:15 47:25 48:6 49:10 54:11 59:25 61:8 timely 44:25 57:2 times 7:21 54:17 59:21 title 14:15 17:12,21 17:22 26:20,20 28:3 28:19 31:5 42:2 44:3 45:14,15 46:19 46:21 47:3 today 5:9 7:16 10:6 10:7,16,25 11:6,8 11:10 12:13 16:12 17:13 23:12 35:1,11 35:13 51:8 52:14 53:13 55:21 56:10 57:23 60:15 61:9 63:16 65:18 today's 5:6 9:18,20 42:21 51:9 66:11 told 52:24 tolerate 49:9,11 top 35:25 36:8 41:14 totality 35:9 totally 8:6 tough 59:2 transcribed 2:25 transcriber 69:9 transcript 9:18 69:3 transfer 56:21 transferred 52:23 56:9,19,20 57:1 58:10 59:3 61:10,14 61:19 treat 38:18 treatment 11:15,15 troublesome 37:18 troubling 33:22 trs 30:9 true 9:4 15:18 18:20 50:22 51:4</p>	<p>69:4 trustee 3:10 10:5 11:9,24 13:1,3,24 14:20,22 16:14,18 17:3 19:5 22:1,14 22:15 24:3 25:14,18 25:19,24 26:2,8 27:2,5,20,25 28:4 28:17,23 29:1,3 30:4,19 31:4,10 32:11 34:10 35:19 36:19 38:7 44:14,16 45:8,9,20 46:5,10 46:22 47:15 48:19 55:11,23 58:3,24 61:17 62:5,7,15,23 63:19 66:1 trustee's 10:6,11,24 11:3 12:2,6,18 17:16 20:25 24:14 24:20 26:3,16 28:8 39:3 45:4,24 46:7 49:12 66:9 trustee's 2:4 67:9 67:14,18,22 try 42:23 trying 19:23 22:22 tuesday 35:12 tully 3:16 11:22 turn 9:21 33:8 turned 55:5 turning 33:8 turns 42:11 44:12 60:12 twenty 2:4 67:9,14 67:18,22 two 6:7,16 7:11 8:2 8:9 15:23 19:20 27:17 30:22 45:2 48:18 52:14,18 54:18 58:14 60:14 62:18 64:13 type 59:1 types 16:10 typical 36:10</p>	<p>u u 36:8 u.s. 1:16,25 uh 41:20 ultimate 17:14 ultimately 17:24 21:18 22:12 23:12 36:20 unclean 65:10,14 uncover 27:6 uncovers 38:7 underlying 17:20 47:24 48:6 52:5 60:5 understand 5:9 13:13,21 16:6 23:3 36:18 41:4 42:15 44:20 45:18 51:3,14 54:3 55:22 56:24 57:20 59:18 65:22 understanding 21:22 44:22 understood 7:9 16:23 19:19 21:1,17 undertake 30:19 unexpected 62:2 unfair 57:5 61:5 unfortunate 24:18 56:24 59:17 unfortunately 61:3 unintentionally 58:19 uniondale 4:11 united 1:1 unknown 28:20 44:9 unrad 4:20 63:2,4,4 63:7,9,11,13 65:6 65:22 66:14 unreasonable 30:23 unreturned 46:10 untimely 11:7 39:4 unwarranted 11:5 uphold 57:19 upholding 10:11 urges 31:4</p>	<p>useful 11:12 users 41:17 usually 54:23 v vacation 31:15 variety 49:9 various 18:12 29:8 33:22 35:23 veritext 69:11 versus 30:15 32:25 33:1 48:8 vice 64:15 view 8:2 viewed 20:25 violation 48:10 voluminous 7:24 w wait 16:21,24 61:12 61:12 wal 22:10 33:15 41:9 wall 20:7,12 34:20 want 20:9 44:14 61:19 62:4 wanton 26:11 warranted 26:18 washington 4:4 waste 38:5 way 11:18 20:18,19 21:16 22:17 31:21 36:23 37:16 43:15 53:12 60:2,21 we've 12:12 25:7 35:24 52:16 57:21 website 13:8 25:22 25:23 week 54:18 wegner 30:14 32:25 weigh 22:7 weil 3:2 5:5 welcome 52:25 welcoming 58:2,20 went 15:10 18:10 18:15 20:16 39:17 43:14 58:13</p>
--	---	---	--

[what'd - zpr's]

Page 16

what'd 23:16 willful 26:11 48:10 win 3:7 5:4,4,15 9:19 10:1 wish 59:21,24 woman 36:6,7 wonder 54:7 word 8:12 words 37:25 work 20:2,7,10 32:15 worked 18:9 20:3,4 20:9 working 20:12 33:15 41:9 world 21:9 55:1,3 63:23 worthwhile 56:11 write 32:17 37:25 written 8:19 36:14 40:4,8 42:1,4 43:18 46:20 50:2 64:24 66:11 wrong 43:5,14 45:7 52:7 58:14 65:25 wrote 57:20	zpr's 65:3
x	
x 1:3,9,14 67:1	
y	
yeah 27:23 53:17 year 13:1 14:11 30:12 years 9:1 49:20 53:5 yesterday 7:17 8:11 8:13 york 1:2,18,18 3:5 3:12 30:15 32:25 54:17 56:16	
z	
z 36:8 zaw 3:7 5:4 zpr 4:16 63:1,14,17 64:3,5,10,23 65:7 66:6 67:24	

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